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HAWAIIAN REPORTS

VOLUME 17

CASES DECIDED

IN THE

Supreme Court of the Territory of Hawaii

September 19, 1905, to September 27, 1906

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ERRATA.

Page 81, read Attorney McClanahan for McClanhan.

" 180, last line at bottom, read Yanktown for Yorktown.

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JUSTICES
OF THE
SUPREME COURT OF HAWAII

DURING THE TIME OF THESE REPORTS:

CHIEF JUSTICE,

HON. WALTER FRANCIS FREAR.

ASSOCIATE JUSTICE,

HON. ALFRED S. HARTWELL.

ASSOCIATE JUSTICE,

HON. ARTHUR A. WILDER.

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CASES DECIDED

BY THE

SUPREME COURT

OF THE

TERRITORY OF HAWAII.

D. KANEALII *v.* JACOB HARDY, CIRCUIT JUDGE OF
THE FIFTH CIRCUIT.

ORIGINAL.

ARGUED SEPTEMBER 12, 1905. DECIDED SEPTEMBER 19, 1905.

FREAR, C.J., AND CIRCUIT JUDGES DE BOLT AND LINDSAY IN
PLACE OF HARTWELL AND WILDER, JJ.

APPROVAL OF OFFICIAL BOND, MANDAMUS—*powers and duties of approving officer.*

Although a circuit judge, in passing upon the bond of a county supervisor, may and should require the latter to show himself *prima facie* entitled to the office, he cannot go back of the proper credentials and pass upon the question of the validity of the nomination. If the supervisor shows himself *prima facie* entitled and the bond is sufficient, it is the duty of the judge to approve it, even though he is informed that quo warranto proceedings are to be brought to contest the applicant's title on the ground that the nomination papers were fraudulent and forged.

The doctrine that a writ of mandamus is not always a matter of absolute right even to enforce a clear duty, and may be denied when to issue it and enforce the duty would aid in the perpetration of a fraud, does not apply where the facts are disputed and the fraud is merely a matter of suspicion or accusation. Mandamus is not a proper method of trying title to an office and the court should not, any more than the officer whose duty it is to pass on the bond, go back of the apparent title of the applicant and pass upon the validity of his nomination.

The circuit judge should pass upon the sufficiency of the bond with reasonable promptness. He should not postpone action upon it until quo warranto proceedings, whether pending or impending, to test the title to the office shall terminate, and upon such postponement he may be compelled by mandamus to act.

MANDAMUS—*when appeal lies and when act judicial.*

Mandamus lies to compel a circuit judge to pass upon the sufficiency of a supervisor's bond when he refuses to do so, even if passing upon the bond is an act of a judicial or discretionary nature and even if an appeal would lie from a disapproval of the bond.

OPINION OF THE COURT BY FREAR, C. J.

This is an application for a writ of mandamus to compel the respondent to approve or pass upon the sufficiency of the bond of the petitioner as a member of the board of supervisors of the county of Kauai, under section 21 of Act 39 of the Laws of 1905, known as the County Act.

The petitioner sets forth in substance that he was a candidate for the office of supervisor at large for the county of Kauai at the election held June 20, 1905, that he received a majority of all the votes cast at said election for said office, that he received a certificate of election and took the oath of office, and that on July 1, 1905, he presented to the respondent his bond and requested him to approve the sufficiency thereof, but that the respondent refused and still refuses so to do although, it is alleged, he admitted the sufficiency of the bond and approved the sufficiency of another similar bond.

The respondent sets forth as his reason for refusing to approve

the bond that he had been informed by the county attorney that the petitioner's title to the office of supervisor was disputed and would be contested upon the ground of alleged forgery of certain names upon the petition for the petitioner's nomination, and further shows that a short time thereafter, namely, July 3, 1905, quo warranto proceedings to test the petitioner's title to said office were instituted before the respondent as circuit judge, which proceedings were afterwards stayed by a temporary writ of prohibition issued by a member of this court (see case post, p. 9), and that at the July term, 1905, of the respondent's circuit court, namely, July 8, 1905, the petitioner was indicted by the grand jury for forging the said nominating petition and, on July 12, pleaded not guilty to the said indictment, and that the said case was at the request of his counsel continued until the November term of said court. The respondent more particularly states that upon being informed that such quo warranto proceedings would immediately be taken he "refused to act in the matter by approving the bond, and explained to the petitioner that the reason for so refusing was that proceedings to contest his right to the office were being taken, and that the case would come before respondent for decision, and that it would be inconsistent and improper to take any action in the matter of approving the bond, until the case had been heard and decided. * * * The act of respondent on the occasion referred to, had no reference to the pecuniary sufficiency of the bond, but was directed to the questioned right of petitioner to hold the office."

The point that is perhaps most relied upon by the respondent is that the court ought not by mandamus to compel the performance of an act that would work a public or private mischief, or compel compliance with the letter of the law in disregard of its spirit or in aid of a palpable fraud. As the respondent says in his answer, "It seems but a reasonable and safe view to take, that a judge, whose special duty it should be to promote the public good, should hesitate to help induct into office of a highly important and responsible nature, one who is gravely charged

with using unlawful means to obtain it," or, as stated in *People v. Assessors*, 137 N. Y. 204, cited by respondent's counsel: "The writ of mandamus is not always demandable as an absolute right, and whether it shall be granted or not frequently rests in the discretion of the court. * * * The writ will be granted to prevent a failure of justice, but never to promote manifest injustice. It is a remedial process and may be issued to remedy a wrong, not to promote one, to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud. The relator must come into court with clean hands * * *"

The answer to this contention is that it does not appear that the nomination papers were fraudulent or forged, and that the judge is not given any jurisdiction in passing upon the sufficiency of the bond to decide upon the validity of the nomination papers. Neither the petitioner nor any one else has been convicted of forging the nomination papers, nor has the validity or invalidity of those papers been determined in quo warranto or any other proceedings. It is true that an officer who is charged with the duty of approving the bond of another officer is not obliged to approve a bond presented by any person. It is his duty to approve the bond of only the person entitled to the office, and yet all that he can require is proper credentials of the applicant or a prima facie showing that the applicant is entitled to the office; he cannot in general enter into an investigation for the purpose of passing upon the validity of those credentials or at least the validity of the acts leading up to the acquisition of those credentials. The approval of the bond does not assume the validity of the election but is merely one step in the process by which the applicant may be put in a position to show an apparent right or to contest proceedings that may be brought questioning his title to the office. How, for instance, in the present case, could the petitioner sustain his right to the office in the quo warranto proceedings in the absence of the approval

of his bond, even if he showed that his nomination papers were valid? Even this court, in these mandamus proceedings, cannot go into the question of the validity of the nomination, for mandamus is not a proper method of determining title to office. Courts often compel by mandamus boards of canvassers to count the ballots and declare the results irrespective of alleged violations of law in the prior stages of an election. For example, in *State v. Van C&*, 36 Neb. 91, 104, the court allowed a writ of mandamus to compel the canvassing officers to discharge their duties and issue certificates of election, holding that neither the canvassers nor the court could inquire into the regularity of the relator's nomination, and citing other cases to the same effect. In this respect the case is much like that of *Harris v. Cooper*, 14 Haw. 145, in which it was held that the secretary of the Territory could not in preparing the ballots go back of the question of due nomination and pass upon the question of the eligibility of the candidate. In that case several arguments were considered and disposed of similar to some of the arguments presented upon this phase of the case now before us, and many cases were there cited, among which reference may be made to *People v. Board of Canvassers*, 129 N. Y. 360, as one which might at first view be deemed to support the respondent's case, and which is cited in the case of *People v. Assessors*, above referred to as relied upon by respondent's counsel. In *Harris v. Cooper*, the court held that it was the duty of the secretary to place on the ballots the name of a candidate duly nominated even though he was ineligible, and declined to compel the secretary to omit such name. *People v. Board of Canvassers* presented the converse case. There the question was whether the court should compel the board to issue a certificate of election to one who was ineligible. The court was unanimously of the opinion that it was the duty of the board to issue the certificate, and that it could not go behind the returns and inquire into the eligibility of the candidate, but the majority of the court held, on the principle above referred to that mandamus should not issue when it would aid in the accomplishment of a wrong, that the

writ should not be issued inasmuch as the ineligibility of the candidate was undisputed; the minority were of the opinion that the writ should issue notwithstanding the undisputed ineligibility of the petitioner. The present case, however, differs from the New York case just cited in that the invalidity of the nomination papers is not undisputed, and neither the circuit judge in the matter of approving the bond nor this court on mandamus can try the question whether those papers were fraudulent or forged or not.

In *State v. Plambeck*, 36 Neb. 401, the county judge refused to approve the bond of a county supervisor on the ground that he had not been appointed by the proper authorities. The court held that the judge was compellable by mandamus to approve the bond in case he found it sufficient, saying, among other things, that,

"The object and purpose of this action is not to induct the relator into an office already filled by another; it is to compel the respondent to approve his official bond, a duty imposed upon him by law, thereby to better enable the relator to test his title to the office in a proper proceeding before a competent tribunal, in which the incumbent of the office could be heard in his own behalf. Although the question of strict title to the office in dispute cannot be determined in a collateral proceeding like this, sufficient investigation may be made to ascertain whether the certificate of appointment held by the relator is *prima facie* evidence of title. If relator makes claim to the office by virtue of color of title, he was entitled to have the respondent approve his bond, the sufficiency of the bond tendered being admitted. * * * At least, the appointment of the relator is *prima facie* evidence of title to the office; hence it was the duty of the respondent to have approved the bond of the relator. The statute confers no authority or power upon the officer whose duty it is to approve official bonds to pass upon or decide the validity of the claims to an office under conflicting commissions, nor can such approving officer refuse to approve the official bond presented to him by one claiming the office under color of title, even though the office may at the time be filled or claimed by another."

In *Beck v. Jackson*, 43 Mo. 117, a writ of mandamus was

ordered to compel a circuit judge to proceed to approve the bond of one claiming to have been elected clerk of the court, which the judge had refused to do on the ground that he had appointed another to the office and had already approved his bond and put him in possession of the office. The court said:

"This is not a proceeding asking to be inducted into the office; it is merely a demand that the respondent shall proceed to perform a duty devolved on him by law; and for a refusal or neglect to perform, the relator is remediless unless the court issues the writ. The commission issued by the governor was at least *prima facie* evidence of title to the office, and, if its validity or legality should be disputed, that question can only be determined by a proceeding in the nature of a quo warranto, * * *" See also *State v. Shannon*, 133 Mo. 139.

Another contention much relied upon by the respondent is that he ought not to be compelled to pass upon the sufficiency of the bond while there is pending a quo warranto proceeding to test the petitioner's title to the office. From what has already been said the fact that such quo warranto proceeding was pending would perhaps be an additional reason for passing speedily upon the sufficiency of the bond, so as to enable the petitioner to defend himself properly in that proceeding. The cases relied upon by respondent's counsel to the contrary, namely, *Hannon v. Commissioners*, 89 N. C. 123, *People v. Warfield*, 20 Ill. 159, and *Lewis v. Commissioners*, 14 Oh. St. 515, are not in point. In *Speed v. Common Council*, 97 Mich. 198, it was held that the common council should be required by a writ of mandamus to approve the bond of one claiming to be city councilor who showed proper credentials therefor, notwithstanding the pendency of quo warranto proceedings to determine the title to the office. In *State v. Commissioners*, 31 Oh. St. 451, a peremptory mandamus was awarded to compel the commissioners to proceed to pass upon the sufficiency of the bond of a county recorder elect, and, if they found the bond sufficient, to approve the same, notwithstanding that proceedings were pending in regard to the title to the office. The court said:

"The section impliedly imposes upon the county commission-

ers the duty of acting with reasonable promptness, in either approving or rejecting the sureties to the bond when presented for that purpose, by a person who shows that he is legally authorized to demand such action at their hands. When, therefore, as in this instance, they declined to act with reasonable promptness, in the approval or rejection of the sureties of the bond, when it was properly presented to them, they will be compelled to act in the matter, unless they show some valid reasons why they should be excused for such non-action. The principal ground upon which the commissioners resist the allowance of the writ is, in substance, that they have not rejected or finally refused to approve the sureties to the bond, but are, for the present, holding the matter under their control, with a view to final action sometime in the future, and, if not before, when the alleged litigation between the contestants is terminated; and that it is not true, therefore, that they have refused to approve the sureties of the bond, as alleged."

The court held this ground insufficient. See also Murfree on Official Bonds, Sec. 320. It may be added that the quo warranto proceedings in the present case had not been instituted at the time when the respondent declined to pass upon the sufficiency of the bond. This alone might be a sufficient answer to the respondent's contention. See *State v. Commissioners*, *supra*, at page 456.

Two minor contentions are made by respondent's counsel, (1) that mandamus does not lie where there is a right of appeal from the action complained of, and (2) that the passing upon the bond is a judicial act and that mandamus will not issue to compel the performance of a judicial act in a particular manner. Without conceding that mandamus would not lie under the circumstances, even if an appeal would lie, it is not altogether clear that an appeal would lie from the disapproval of the bond, but in this case, as we understand it, the respondent has not passed upon the sufficiency of the bond at all, either by way of approval or by way of disapproval, but has postponed action thereon. In such case he can be required to act. Likewise, assuming that the act is of a judicial or discretionary nature, the judge may be compelled to act, even if not in a particular man-

ner, although the cases above cited, as well as many other cases, show that mandamus lies to compel an approval of a bond where the bond clearly appears or is admitted to be sufficient. In the present case it does not clearly appear nor is it admitted that the bond is sufficient. The writ, therefore, if issued, should be to compel the respondent to pass upon the sufficiency of the bond, and, if he finds the bond sufficient, to approve it. He, however, in his answer, states that if the members of this court are of the opinion that it is his duty to pass upon the sufficiency of the bond he "will wholly comply with their decision, waiving the issue and service of a peremptory writ." We are of such opinion and we take it from the respondent's answer that it will be unnecessary, in view of this conclusion, to issue the writ although the petitioner may have it issued should it be necessary.

W. S. Edings for petitioner.

John D. Willard for respondent.

D. KANEALII v. JACOB HARDY, CIRCUIT JUDGE OF
THE FIFTH CIRCUIT.

ORIGINAL.

ARGUED SEPTEMBER 12, 1905. DECIDED SEPTEMBER 19, 1905.

FREAR, C.J., AND CIRCUIT JUDGES DE BOLT AND LINDSAY IN
PLACE OF HARTWELL AND WILDER, JJ.

PROHIBITION—*circuit judge has jurisdiction in quo warranto even though prayer for relief may be too broad.*

A circuit judge is not without jurisdiction of a quo warranto proceeding merely because the petition prays for putting the relator in office as well as for ousting the respondent, even if the statute permits only a judgment of ouster.

QUO WARRANTO—*jurisdiction of circuit judges over election questions under county act.*

Under the county act (L. 1905, Act 39) the original jurisdiction of the supreme court in election contests is confined to certain classes of questions, and even if it is exclusive as to those it does not exclude jurisdiction of circuit judges over other questions in quo warranto proceedings.

COUNTIES ARE CORPORATIONS—*within meaning of quo warranto statute.*

Counties, which are naturally quasi corporations and by the county act are made bodies corporate and politic and permitted to sue and be sued in their corporate names, are corporations within the meaning of the quo warranto statute, although they may not be within the meaning of all statutes.

OPINION OF THE COURT BY FREAR, C. J.

This is a petition for a writ of prohibition to restrain the respondent, as circuit judge, from taking further action in a quo warranto proceeding instituted before him to oust the petitioner herein from the office of supervisor of the county of Kauai and to put in possession of such office the relator therein, C. H. Willis, upon the ground that the petitioner herein, although he received a majority of the votes cast for such office, was not entitled to the same because, as it was alleged, his nomination papers were fraudulent and forged, and that the relator therein was entitled to the office inasmuch as he had received votes for the same and was the only other candidate. The contention is that the circuit judge is without jurisdiction of the quo warranto proceedings.

A minor ground relied upon to show that the judge is without jurisdiction is that under the statute (Rev. L. Secs. 2044-2052) relating to quo warranto, judgment, if unfavorable to the respondent, can be rendered only to oust him from the office and cannot be rendered also to put the relator in office. If such is the case, it would not affect the jurisdiction of the circuit judge to entertain the quo warranto proceedings in so far at least as the title of the respondent therein to the office is concerned.

One of the principal grounds relied on is that under sections

40-50, comprising chapter 11, entitled "Contests," and section 59 of chapter 12, entitled "First Election," of Act 39 of the Laws of 1905, known as the County Act, the supreme court has exclusive jurisdiction of the questions involved in the quo warranto proceedings. The sections particularly applicable are the following:

"Section 40. All questions as to the validity of any ballot cast at any election held hereunder shall be decided immediately and the opinion of the majority of the Board of Inspectors of Elections at each polling precinct shall be final and binding, subject to revision by the Supreme Court of the Territory as hereinafter provided."

"Section 41. Any candidate directly interested, or any thirty duly qualified voters of any election district, may file a petition in the Supreme Court of the Territory setting forth any cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed."

"Section 46. At the hearing, the Court shall cause the evidence to be reduced to writing and shall give judgment, stating all findings of facts or law. Such judgment may invalidate the election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the Inspectors of Election; or decide that a certain candidate, or certain candidates, received a majority or plurality of the votes cast and were elected. If such judgment should be that the election was invalid, a certified copy thereof shall be filed with the Governor of the Territory or the Board of Supervisors, as the case may be, and he or they shall call a new election within sixty days after filing such judgment; and if the Court shall decide which candidate or candidates have been elected a copy of such judgment shall be served on the Secretary of the Territory or the County Clerk, as the case may be, and the officer herein thereto authorized to deliver certificates of election shall sign and deliver to such candidate or candidates certificates of election, and the same shall be conclusive of the right of the candidate or candidates to the office."

"Section 47. The decision of the Court concerning any question properly involved in any such petition and proceeding shall be final and binding upon all parties."

Whether special jurisdiction given by statute in election matters is exclusive or not is a question upon which there is some

conflict of authority. Perhaps the prevailing view is that it is not exclusive unless an intention is shown to make it so, as, for instance, in *Re Contested Election*, 15 Haw. 323, in which it was held that each house of the legislature was sole judge of the elections, returns and qualifications of its own members, and that the provisions of law which had previously conferred such jurisdiction exclusively upon the supreme court had been repealed by the Organic Act of the Territory. It may well be that the jurisdiction of the supreme court is exclusive as far as it goes and that the circuit judge has no concurrent jurisdiction of questions that might be decided under the sections of the statute above referred to, but in our opinion the jurisdiction so conferred upon the supreme court is limited to certain classes of questions and the jurisdiction which circuit judges might otherwise have in quo warranto proceedings over other questions arising under the election laws is not excluded. Under section 40, above quoted, questions as to the validity of any ballot are to be decided finally and conclusively by the board of inspectors, subject only to revision by the supreme court. The board could not go back of the question of the validity of a ballot and inquire into the question of the validity of a nomination. See case between the same parties, ante p. 1. And likewise the supreme court, in revising any such decision of a board of inspectors, could not consider questions which the board itself could not consider. Section 41 limits the petition for such revision to causes for reversing, correcting or changing the decision of the board. Section 46 permits judgment of invalidation only upon the ground of a mistake or fraud on the part of the inspectors, and a judgment of the election of a candidate only upon the ground that he has received a majority or plurality of the votes cast. Section 47 provides that the decision of the court shall be final and binding only as to questions properly involved in "such petition and proceeding." It is true that the latter part of section 46 provides that a certificate of election issued in pursuance of a judgment of the court shall be conclusive of the right of the candidate to the office. That language is, no doubt,

exceedingly broad and not easily reconcilable with the other provisions of the statute, and yet all parts of the act must be construed together and in case of apparent conflict it seems to us that the provisions of the rest of the statute are so plain that they should control, in which case the clause in question should be construed as meaning that the certificate would be conclusive as to any questions of which the court had jurisdiction in the proceedings in which judgment was rendered. It could hardly have been intended to make the judgment conclusive as to other questions. For instance, it presumably was not intended that the judgment of the supreme court upon a question of the validity of ballots, if favorable to a particular candidate, should conclusively establish his right to the office, even though, contrary to the provisions of section 17 of the County Act, he should not be a citizen of the United States or of the Territory, or a duly qualified elector of the Territory or the county, or, in the case of a county attorney, a duly licensed attorney admitted to practice in the supreme court, or even though, contrary to section 18 of the Organic Act, over which the legislature has no control, he was an idiot or insane person or had been convicted of a criminal offense punishable by imprisonment for a term exceeding one year. This view is strengthened by a comparison of the sections of the statute in question with the former statutory provisions from which they were obviously adapted, namely, section 109 of the Rules and Regulations for Holding Elections (Civ. L. p. 821; see also Rev. L. Sec. 95), and sections 8-15 of Act 8 of the Laws of the Republic (Civ. L. Secs. 1092-1099). Under the former provisions the petition might be grounded, not merely upon a cause why the decision of the inspectors should be changed, but upon any cause "why an election shall be declared void, or a seat in the legislature vacant, or the decision of any board of inspectors, or the marshal or any sheriff, reversed or changed." The petitions are also referred to as "contesting the validity of any election." It is clear that the framers of the present statute intended to limit materially the

questions over which the supreme court should have original jurisdiction in election matters.

The only other contention upon which the petitioner relies to any great extent to show that the circuit judge is without jurisdiction in the quo warranto proceeding is that under the statute of quo warranto above referred to, except as modified by section 1574 of the Revised Laws, which is not applicable to the present case, such proceeding lies against a person who claims or usurps an office in a private corporation only, or against individuals acting as a private corporation without being legally incorporated, and does not extend to officers of counties, which may be classed as quasi corporations. The distinction is pointed out between municipal corporations proper and quasi municipal corporations, such as counties, which are merely agencies or instrumentalities of the general government,—a distinction recognized in *Coffield v. Territory*, 13 Haw. 478—and it is contended that officers of quasi corporations are not within the quo warranto statute just as officers of the general government are not, as held in *Brown v. Spencer*, 8 Haw. 542. The case last mentioned held that the statute of quo warranto confined the issuing of the writ to corporations and officers of corporations and was not applicable to individual officers of the general government, but that case contained nothing to indicate that the statute was confined to private corporations. In *Thomas v. Norton*, however, at page 67 of the same volume, Mr. Justice Bickerton in an opinion based upon a different ground, which was sustained by the full court, seemed to intimate that if the Honolulu fire department was a quasi corporation it would be within the quo warranto statute, but there was no decision to that effect. The statute now in question defines the writ as one, among other things, “directed to a person who claims or usurps an office in a corporation,” and provides that it may be granted also “against individuals acting as a corporation, without being legally incorporated, and against any corporate body offending against the provisions of any law relating to such corporation,” etc. Secs. 2044, 2045. These sections contain no words to indicate that

private corporations alone, as distinguished from municipal or quasi municipal corporations, are intended. The remaining sections are also in general as applicable to one class as to the other class of corporations, excepting, perhaps, section 2048, the last clause of which might be considered as more appropriate to private corporations. That section provides that if the respondent does not answer within the time allowed the judge shall declare him not qualified, etc., and "shall direct the corporation to proceed to a new appointment," but even this clause might be as applicable to municipal corporations under some circumstances as to private corporations under most circumstances. In either case "appointment" would probably have to be construed as including "election." In so far as this clause might be inapplicable to either class of corporations it would simply have no effect. The statute as a whole would be applied only so far as applicable in each instance. It may be also that the legislature did not have in mind counties, or even municipal corporations proper, at the time of the original enactment of this statute in 1876, for there were no counties or municipal corporations proper in existence at that time, but if the statute is broad enough to include such corporations there is no conclusive reason why it should not apply to them when they are brought into existence. There may possibly have been some quasi municipal corporations at that time, and the section of the general corporation law (Civ. Code, Sec. 1442; see Rev. L. Sec. 2542) which conferred power on the minister of the interior to grant charters seemed to imply that municipal corporations might be included under "corporations" unless specially excepted, for that section closes with the clause, "banking or municipal corporations alone, excepted, which shall be chartered only by the legislature." Municipal corporations, as well as private corporations, are within the letter of the law, but are they within the spirit or intent of the law or is there any rule of construction which would require us to hold that they are not within the law unless specially named or brought within the law by clear implication? It is sometimes held, as in *Bowler v. Board of Immigration*,

7 Haw. 715, that the general government or boards or persons acting on behalf of it and not in their personal capacity are not within statutes of certain kinds unless that is clearly intended. Perhaps a majority of the cases hold that municipal corporations, or at least quasi municipal corporations, are not within laws relating to attachment and garnishment unless such an intent is clearly manifested. For example, in *Cedar County v. Johnson*, 50 Mo. 225, it was held that a county was not included under the word "person" in the attachment law, notwithstanding a general provision in the law upon the construction of statutes that the term "party or person" should include bodies politic, a provision somewhat similar to that found in section 16 of our Revised Laws which provides that the word "person" and other words importing persons "signify not only persons, but corporations, societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally, when it appears, from the subject matter, the sense and the connection in which such words are used, that such construction is intended." The court, in the Missouri case, held that counties and townships were not included in the term "bodies corporate." Similar views were held in the following three cases cited by the petitioner: In *Stermer v. La Plata County*, 5 Colo. App. 379, it was held that a garnishment statute did not apply to a county, although it provided that the word "person" extended to "bodies politic and corporate," and the county act provided that each county should be a "body corporate and politic" and as such empowered to "sue and be sued." In *McDougall v. Supervisors*, 4 Minn. 184, it was held that counties were not liable under a garnishment statute relating to "corporations." In *State v. Tyler*, 14 Wash. 495, it was held that counties were not within a garnishment statute, although they were authorized to be sued, and although the act relating to garnishment extended to corporations. A considerable number of courts, however, hold that even under attachment and garnishment statutes municipal corporations and even counties are included. In *Adams v. Tyler*, 121 Mass. 380, it was held that

a county was included under a garnishment statute which related to any "person or corporation" where the county act also provided that each county should "continue a body politic and corporate for the following purposes: to sue and be sued," etc. In *Whidden v. Drake*, 5 N. H. 13, it was held that towns were within a garnishment statute which related to "any corporation or body politic" although, as the court stated, the terms of the statute were "such as are commonly used to denote persons who conduct the affairs of private corporations, and some of them are exclusively appropriate to denote such persons." In *Bray v. Wallingford*, 20 Conn. 416, it was held that towns were included under the word "person" in a garnishment statute. In *Wilson v. Lewis*, 10 R. I. 385, it was held that a city was within a garnishment statute relating to bodies corporate when the inhabitants of every town and city were also declared to be "a body corporate." Special reasons of public inconvenience are often set forth in support of the view that counties and municipal corporations proper should not be construed as included under attachment and garnishment statutes except by clear expression or implication, but such reasons have been repudiated with much force by other courts and text writers whose opinions are entitled to great respect. Whatever weight should be given to them so far as attachment and garnishment proceedings are concerned, they have little or no application to quo warranto proceedings. Such proceedings are indeed peculiarly appropriate to officers of such corporations, and the County Act itself provides not only (in Sec. 9, subd. 1) that each county shall have power "to sue and be sued in its corporate name" but (in subd. 8) that each county shall, for the purposes and objects of the act, be "a body corporate and politic." In our opinion these bodies corporate and politic are included under the term "corporation" in the quo warranto statute. It would seem that this statute should be amended so as to include also officers of the general government and thus obviate the difficulty found in *Brown v. Spencer*, *supra*.

It is perhaps not altogether clear whether the petition in the

quo warranto proceeding shows that the respondent therein is in possession of the office so as to be ousted in those proceedings if they should conclude against him, but perhaps the allegations of the petition are sufficient upon this point, or, if not, they may be subject to amendment and ought not to be made the basis of granting the writ on the ground that the circuit judge is entirely without jurisdiction.

We understand also that the ground upon which the quo warranto proceedings are based is not that the respondent therein should be ousted as disqualified from holding the office under section 18 of the Organic Act, which disqualifies one who has been convicted of a criminal offense punishable by imprisonment for a term exceeding one year. The respondent has not yet been so convicted and the mere commission of an offense without conviction is not a disqualification. Perhaps, even if it were, the circuit judge could not pass upon that question until after conviction by a jury. See *State v. Humphreys*, 74 Tex. 466; 5 L. R. A. 217, and the cases there cited. See, however, *Commonwealth v. Allen*, 70 Pa. St. 465. The question of disqualification to hold office is not involved in the quo warranto proceeding. The cause relied on for ousting the respondent in that proceeding is that he was not duly nominated because his papers were fraudulent, the ground of the alleged fraud being that the signatures to the nominating papers were forged. Moreover, the allegation in the petition for the writ of quo warranto is not that the respondent therein committed the forgery but that the nomination papers were fraudulent and forged, and that the persons, whose names appear on the nominating petition, never signed their names thereto nor authorized any other person to sign their names thereto, and that the respondent therein, or some person on his behalf, fraudulently deposited said nomination papers with the secretary of Hawaii and fraudulently induced the secretary to place said respondent's name upon the official ballot as candidate for supervisor. We do not feel called upon at present to define the extent to which the circuit judge may go into the question of the alleged forgery of the nomina-

tion papers or what the result would be if he should find that some or all of the signatures thereto were forged, nor have counsel presented this question.

A peremptory writ is denied and the temporary writ is dissolved.

W. S. Edings for petitioner.

John D. Willard for respondent.

TERRITORY OF HAWAII v. AH ON.

QUESTION RESERVED BY CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 27, 1905. DECIDED SEPTEMBER 28, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TERM OF COURT—*does not lapse by failure to open on day designated by statute when such day is legal holiday.*

Under the special provisions of the Rev. L., Secs. 1644, 1646, as amended by L. 1905, Acts 34, 37, it is held that the September term, 1905, of the circuit court of the first circuit did not lapse by reason of a failure to open the same until the day after the first Monday of September, although the statute prescribed that it should open on the first Monday, which, however, was a legal holiday.

OPINIONS DELIVERED ORALLY.

The question was raised in this case in the circuit court by defendant's plea to the jurisdiction of that court and reserved by the trial judge for the consideration of this court, whether or not the September term, 1905, of that court lapsed, for the reason that it was not opened until the day after the first Monday of September, although the statute prescribed that it should open on the first Monday, which, however, was a legal holiday,

namely, labor day. The following opinions were delivered orally:

FREAR, C.J.: The court is of the opinion that the term did not lapse. This opinion is based upon the construction of the statutes relating to terms of court, and therefore it will be unnecessary to discuss the numerous authorities cited by counsel on both sides as to whether or not a holiday is a nonjuridical day in the absence of an express provision or clear implication to that effect, or as to what the effect of a failure to open court upon the day designated by statute is under ordinary circumstances. Section 1644 of the Revised Laws, as amended by Act 34 of the Laws of 1905, which prescribes the days upon which the terms of the various circuit courts shall be held, provides that the terms in the first circuit shall be "held" on the first Mondays of January, April and September. Section 1646, as amended by Act 37 of the Laws of 1905, provides that the terms in the second, third and fifth circuits may be "continued and held from the opening thereof, respectively, until and including the twenty-fourth day thereafter, Sundays and legal holidays excepted," and that the terms in the first and fourth circuits may be "continued and held from the opening thereof, respectively, until the time fixed by law for the commencement of the next succeeding terms of such courts." This section contains also other provisions to which reference need not be made. These two sections must be construed together, particularly as they relate to the same subject and were originally parts of the same act, before their incorporation in the Revised Laws. It is obvious that the legislature did not intend that the second, third and fifth circuit courts should be held on legal holidays any more than on Sundays; and this provision, in section 1646, applied to all the circuit courts before the terms of the first and fourth circuit courts were lengthened. There can be little doubt that Sundays and legal holidays were intended to be excepted from the terms of the first and fourth circuit courts as well as from those of the second, third and fifth circuit courts, but it was not necessary to repeat the exception or to set it forth in

so many words in the clause in which the terms in the first and fourth circuits were made to extend until the next succeeding terms in those circuits. There was not the same necessity for expressing such exception in that clause as there was in the provision which defined the terms of the second, third and fifth circuit courts by stating the number of days during which they might continue. This section (1646) must be regarded as more specific, and therefore controlling, so far as Sundays and holidays are concerned, as compared with section 1644, which is, upon this point, of a more general nature. That Sundays and holidays were intended to be excluded, so far as holding terms are concerned, is supported further by the provisions of section 1631, relating to the terms of the supreme court, which was originally part of the same act, that is, the judiciary act of 1892, and which provides that the supreme court shall be deemed to be continuously in session "except on Sundays and legal holidays" for the issue, return and hearing of certain writs, and that such writs, should necessity require, may be issued on a "Sunday or legal holiday." Construing these various provisions together it is evident that holidays as well as Sundays were intended to be excluded so far as holding terms of court are concerned, even if the mere fact that the first Monday in September is designated by section 115 of the Revised Laws to be a holiday would not make it *dies non*. This construction is more natural, and less is required to manifest it, in view of the popular impression as to the effect of declaring a certain day a holiday than would be the case if such impression were the other way. We cannot take the view presented by counsel that the mention which is made of holidays in section 1646 has no other effect than to indicate what days should be included in estimating the length of the terms, with the result that in the second, third and fifth circuits the courts might be held on holidays, although such days could not be included in estimating the length of the terms. It seems to us that such mention shows an intention that the courts need not, and perhaps should not, be held on such days. No opinion, however, need be expressed as to whether judicial acts,

if performed on a holiday, would be absolutely void and subject to collateral attack. The question now is merely whether the circuit court was required to hold its term upon such day.

The argument that the statute which provides that the term of the first circuit court should be held on the first Monday in September, that is, the amendatory act of 1905, is of later date than section 115 of the Revised Laws, which prescribes the holidays, and therefore should control, is entitled to little or no weight. Indeed, it is a question which provision is of later date within the meaning of the rule that a later statute controls an earlier. The provision relating to terms was enacted originally in 1892, and amended in 1895, 1903 and 1905, while the provision relating to holidays was enacted originally in 1896, and amended in 1903; both were incorporated in the Revised Laws, which were enacted in 1905. That relating to holidays is of a general nature and it would seem that other laws should be construed with reference to that, and that whether they should control or not should depend upon other considerations than mere priority in time. Moreover, both provisions were incorporated in the Revised Laws and the provisions relating to terms are not altered in the least by the amendments of 1905, so far as holidays are concerned or so far as they affect the present case. Those amendments related to other matters. Further, as already stated, our opinion is based more upon our construction of the provisions relating to terms than upon the provision relating to holidays.

The question reserved is therefore answered in the negative and the circuit judge is advised accordingly.

HARTWELL, J.: I concur with what has been said by the Chief Justice and in the decision. In order to sustain the contention of the defendant's attorneys it would be necessary to hold that the statute imperatively required the performance of judicial work on a legal holiday to the extent, at least, of opening and adjourning the term, and further that it would be discretionary with the judge, if he thought fit to do so, to occupy

the entire day with term work. This is not the ordinary acceptance of the meaning of a legal holiday and I do not think that the legislature of Hawaii intended that holidays should be so used.

The legislative intention on this subject is manifest in the express legislation permitting judges to perform such special judicial duties as are involved in issuing certain extraordinary writs on holidays as well as Sundays. If special legislation was considered necessary in order to validate such writs when issued on holidays, it would seem to be still more requisite in order to validate ordinary judicial work on those days. But it is unnecessary to say whether cases could legally be heard on a holiday, by consent of parties, since the question presented in this case is whether it was compulsory upon the judge to open the court and adjourn it on that day. As it necessarily would follow from holding that this was compulsory upon the judge, that he could, if he wished, occupy the entire day with trials, I do not think that we can properly hold that labor day, being a legal holiday, was *dies juridicus* for any purpose.

The common law, then, applies to this case in not permitting any judicial work.

F. W. Milverton, deputy county attorney, for the prosecution.

A. S. Humphreys and A. Perry for the defendant.

HARRY E. MURRAY v. D. H. LEWIS.

QUESTION RESERVED BY CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPT. 27 AND 28, 1905. DECIDED SEPT. 28, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

JURY LISTS—for what year prepared and when law relating thereto becomes applicable.

Under Rev. L., Sec. 1777, as amended by L. 1905, Act 74, the

"ensuing year" for which jury lists are to be prepared is the year beginning the first of January, or at least not earlier than the 15th of December, following the preparation of such lists, and not the year beginning with the date upon which such lists are prepared; the amendatory act, therefore, although by its terms to take effect from its passage in April, 1905, was not applicable to jury lists for the September, 1905, term of court, and the lists prepared under the law prior to the amendment were applicable to such term.

AMENDATORY ACT—*impliedly repeals former law, when*

An act, expressed to take effect from its passage, amending in certain respects the former law relating to the selection of jurors but the provisions of which are not immediately applicable, is held under the circumstances not to operate as an immediate repeal of the former law so as to leave the subject unprovided for by statute from the passage of the amendatory act until its provisions become applicable.

OPINIONS DELIVERED ORALLY.

The question was raised in this case in the circuit court of the first circuit by defendant's challenge to the array and motion to quash the panel of trial jurors and reserved for the opinion of this court by the trial judge, whether or not the trial jurors in attendance at the September term, 1905, of the circuit court were duly and legally selected, listed and drawn, they having been selected, listed and drawn in accordance with chapter 119 of the Revised Laws as the same existed prior to its amendment by Act 74 of the Laws of 1905.

At the close of the argument on September 27, 1905, the court decided that the question should be answered in the affirmative, holding, against the principal contention of the defendant, that the provisions of the amendatory act, so far as the selection of jurors was concerned, were not applicable to the September term, 1905, of the circuit court, although that act was by its terms to take effect from its passage, and more particularly that the "ensuing year" referred to in the first sentence of section 1777 of the Revised Laws as amended was the year beginning with the first day of January, or at least not earlier than the 15th day of December, immediately following the preparation of the jury

lists by the jury commissioners, and not the year beginning with the date upon which such jury lists were prepared.

The court further suggested the question whether the amendatory act did not replace or impliedly repeal the old law, so that, even if the provisions of the new law were not immediately applicable, still the provisions of the old law were no longer in force, with the result that there was no statutory law for the time being under which jurors could be obtained. This question, however, was not argued by counsel, but on the following day counsel requested the court to reopen the case and allow them to present argument upon this question. The request was granted and after argument the following opinions were delivered orally:

FREAR, C.J.: The court does not deem it necessary to reserve its opinion on this question. It is of the opinion that the jurors for the present term of the circuit court of the first circuit were properly selected under the provisions relating to the selection of jurors set forth in the Revised Laws, that is, under the law as it stood prior to the amendment made by Act 74 of the Laws of 1905.

I do not think a great deal need be said upon this subject. The question seems to be whether the provisions of the new law operated as a repeal of the provisions of the old law from the time of the enactment of the new law. As stated yesterday, the court is of the opinion that the provisions of the new law would not, under all the circumstances, operate as such a repeal until they should become applicable. Without speaking for the other members of the court, it occurred to me that possibly there might be a material distinction in this respect between an act which was in form an amendment of a previously existing law, as, for instance, in the present case, where the new law provides that the old law shall be amended to read so and so—thus changing the very language of the old law at once, and, on the other hand, an act, which was in form an independent act, simply providing that such and such duties should be performed, for instance, by

the jury commissioners, but not to be performed until sometime in the future. In the latter case it would be very clear, I think, that the provisions of the new law would not repeal the provisions of the old law until they should become applicable, for the repeal, in so far as there was a repeal, would be solely by implication on the ground of inconsistency, and there would be no inconsistency until the provisions of the new law became applicable. I have myself greater doubt in a case like the present, where the new act expressly states that the old law should be amended so as to read so and so, that is, where in form the old law itself is changed and there is a substitution of the new for the old, but I am inclined to think on the whole that the distinction cannot be carried so far as to control in the present case. It seems to me that notwithstanding that distinction the provisions of the new act were not intended, as shown by the act itself, to repeal the provisions of the old law until they should become applicable. Much of the old law is left untouched by the new and certain portions of the new are identical or nearly so with corresponding portions of the old law,—for instance, the provision as to the appointment of the jury commissioners, which is substantially the same, and as to their duty to prepare jury lists, which has not been changed; it could hardly be intended that the lists chosen by the jury commissioners last December should be continued and yet be useless; that is, the jury lists under the old law, as unchanged by the new law, would be in existence and yet could not be utilized. That is simply one illustration.

I do not commit my associates to these views. The court, however, is unanimously of the opinion—of the same opinion as it was yesterday—that the new act does not repeal the old except in so far as it is inconsistent with it and in so far as such inconsistent provisions are applicable and when they become applicable.

HARTWELL, J.: When a statute amends a prior statute “so as to read as follows,” transactions under the earlier statute are not thereby invalidated, as it seems to me, and could not be

invalidated without infringing upon the rule against retrospective legislation, which is prohibited by a general and very early statute which was adopted by the Organic Act.

As to the jury list, drawn under the former act providing that it remain the jury list for the year ensuing after December 15, to hold that it is not a legal list ought not to be done by any uncertain inference. I do not think that this result is necessarily implied by the subsequent act. Take appointments of jury commissioners, if they were invalid new appointments would have to be made, if the earlier statute was no longer in force as to past transactions and they could do nothing unless reappointed. To my mind the construction contended for would be repugnant to the general provision against retrospective legislation.

I concur in the decision and practically in the reasoning of the Chief Justice.

WILDER, J.: I concur in the conclusion reached on the reasoning of the Chief Justice, which I understand to be this,—that these two sections of the Revised Laws, 1777 and 1779, as amended, not going into operation until after the opening of the September term, Act 74 of the 1905 laws construed together with chapter 119 of the Revised Laws shows that these sections as unamended should be in force until the amendments went into operation, namely, after the September term. Consequently, the present jury panel was properly drawn.

Thompson & Clemons and F. W. Milverton for plaintiff.

Holmes & Stanley and A. Perry for defendant.

AMERICAN-HAWAIIAN ENGINEERING & CON-
STRUCTION CO., A CORPORATION, *v.* TERRI-
TORY OF HAWAII.

ORIGINAL.

ARGUED JUNE 5, 1905.

DECIDED OCTOBER 2, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CONTRACT FOR CONSTRUCTING PUBLIC WORKS.

A petition claiming extras under a contract for the construction of public works and alleging that they were ordered by the Territory and the superintendent of public works, were not required by the contract, and were and became necessary in the judgment of the superintendent of public works by reason of unforeseen exigencies and errors which required more work to be done than called for, is demurrable.

Under a contract for the reconstruction of a warehouse, involving the removal of an existing structure, and providing that all old material was to be preserved and used in the construction of the new building unless unfit in the opinion of the superintendent of public works, the contractor does not acquire any right or title to any of the old material removed and appropriated by the Territory between the awarding and execution of the contract, and the Territory is not liable therefor unless said old material is fit to be used in the new structure.

OPINION OF THE COURT BY WILDER, J.

The demurrer to the petition in this action having been sustained, 16 Haw. 711, the Territory now demurs to the amended petition on the ground that it does not state facts sufficient to constitute a cause of action.

The original petition claimed the sum of \$2040.80 for extra work under a contract for rebuilding Fort street wharf, and

alleged that this extra work was performed at the request of the Territory. We hold that, as the petition did not show that the extras were furnished upon the written order of the superintendent of public works or his authorized agent, as required by the terms of the contract, it was bad on demurrer, and, even if the written order for the extras could have been waived, such waiver should have been alleged. The amended petition alleges that this extra work was ordered by the Territory and the superintendent of public works, was not required by the contract, and was and became necessary in the judgment of the superintendent of public works by reason of exigencies unforeseen when the contract was made and which could not have been foreseen and by reason of errors in the contract and its specifications which required petitioner to do more work than it otherwise would have done. It is neither alleged that the extras were furnished upon the written order of the superintendent of public works or his authorized agent, or, if it could be done, that such written order was waived. There appearing to be no reason why the former ruling should be reversed, the demurrer is sustained as to this item.

The other item attacked by the demurrer consists of a claim for \$300 for the value of old material removed by the Territory between the awarding and execution of a contract for the reconstruction of the Brewer warehouse, which provided that all the old material was to be preserved, the contractor furnishing all new material needed, and none of the old material which, in the opinion of the superintendent of public works, was unfit, to be used in the new structure. The amended petition alleges that not only by the contract but by the practice and custom in the Territory a contractor contracting to remove old buildings and rebuild was entitled to the old material and old buildings. The former decision held that the contractor under this contract did not acquire any right or title to any of the old material. The amended petition also alleges that the "value of said old material for use in the new structure, so far as the same could be used under the terms of said specification, was the sum of \$100." This does not meet the requirements of the former decision that

"if this material that was removed was fit to be used in the construction of the new building and in consequence of the same having been removed the contractor was under the necessity of securing other material for the new building to its damage * * * such allegations should be made." The demurrer is sustained as to this item.

The demurrer to the amended petition is sustained as to the two items mentioned.

Castle & Withington for petitioner.

M. F. Prosser, assistant attorney general, for the Territory.

FRANK LUCWEIKO AND MINNA LUCWEIKO, HIS
WIFE, *v.* THE TERRITORY OF HAWAII.

ORIGINAL.

SUBMITTED JULY 3, 1905.

DECIDED OCTOBER 2, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COVENANT—*power of the governor to make.*

The plaintiffs having conveyed certain land to the Territory in exchange for other land and upon a covenant by the governor to cause buildings and fences on the land to be removed therefrom and placed on the other land in good condition within sixty days, claimed damages for delay in removing and for not leaving them in good condition: held, on demurrer, that no law of Hawaii authorized the covenant.

OPINION OF THE COURT BY HARTWELL, J.

This is an action of covenant in which the plaintiffs claim of the defendant the sum of \$1500 for breach of a covenant in a conveyance of land made by the plaintiffs to the defendant, and expressed as follows:

"In consideration of the foregoing grant of the said above

described premises to the Territory of Hawaii, I, Sanford B. Dole, Governor of the Territory of Hawaii, do hereby covenant and agree with the said Frank Lucweiko, his heirs and assigns, that I will secure to the said Frank Lucweiko a conveyance to him by the Trustees of the Bishop Estate of certain premises near and adjoining the land of the said Lucweiko remaining at said Kapaakea, being the remaining portion thereof after the conveyance of the above described premises to the Government for street widening purposes, which premises so to be conveyed to said Lucweiko are more particularly described in a deed from the said Trustees of the Bishop Estate to said Lucweiko of even date and executed simultaneously herewith;

“And also that I will within sixty days from the date of the execution and delivery hereof cause all of the buildings and fences upon the said premises by the said Lucweiko conveyed to the Territory of Hawaii as aforesaid, to be removed therefrom and placed upon the remaining portion of the land of said Lucweiko and upon the said land to be conveyed to him by the said Trustees of the Bishop Estate in as good condition as the same are now in, without any cost or expense to the said Lucweiko.”

The alleged breach is that “all the buildings and fences upon said premises in said covenant mentioned were not so removed within sixty days, nor for a long time after said sixty days, and then not in as good condition as at the time of said conveyance, to-wit, the 15th day of June, A. D. 1903.” The defendant demurs to the complaint on the general ground that it does not set forth facts sufficient to constitute a cause of action, and specifically because the covenant “was not executed by an official of the Territory of Hawaii having the power and authority to execute the same” and that the damages sought to be recovered are on a contract made by the governor of the Territory, which he was not by the laws of Hawaii authorized to make.

The demurrer is sustained on the ground last above mentioned, namely, that there was no law of Hawaii authorizing the governor to make the covenant to remove the buildings and fences.

C. C. Bitting for plaintiffs.

M. F. Prosser, assistant attorney general, for the Territory.

W. R. CASTLE *v.* W. O. SMITH, EXECUTOR OF THE
WILL OF W. L. WILCOX, DECEASED.

QUESTION RESERVED BY CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 15, 1905.

DECIDED OCTOBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PLEADING—*notes not attached to complaint on promise of another than maker to pay them.*

In an action upon an independent oral promise made by one to pay as his own debt certain notes made by another, it is not necessary to attach copies of such notes to the complaint, notwithstanding the provision in Rev. L., Sec. 1721, that copies of vouchers, if any, upon which a complaint is predicated shall be annexed thereto.

STATUTE OF LIMITATIONS—*action on promise to pay notes of another, and foreclosure of mortgage, not barred, though action on notes barred.*

An action may be maintained upon an independent oral promise made by one to pay the notes of another, even though an action upon the notes was barred when the action was brought or when the promise was made.

An action upon the notes may be barred without the right to foreclose the mortgage given to secure the notes being barred.

REASONABLE TIME, CONDITION PRECEDENT—*promise to pay when deed procured, held promise to pay within reasonable time and not upon condition.*

A promise to pay the notes of another when the promisor should procure a deed of the property mortgaged to secure the notes, is held under the circumstances to be a promise to pay within a reasonable time,—the procuring the deed being referred to not as a condition precedent to liability but as indicating the time when payment should be made. An action on the promise may be brought after the lapse of a reasonable time if the deed is not procured or if it cannot be procured owing to the death of the promisor.

CONSIDERATION—*forbearance, reasonable time.*

Forbearance to foreclose is a good consideration for a promise by one to pay the mortgage of another; and if no time is fixed for the forbearance it will be construed to be for a reasonable time

STATUTE OF FRAUDS—*when promise to pay debt of another not required to be in writing.*

A promise by one to pay the debt of another is not within the statute of frauds when it is made mainly for the business purposes of the promisor and the consideration for it moves to the promisor or inures or is intended to inure to his benefit, even though the original indebtedness may continue and performance of the new promise will result incidentally in the extinguishment of such indebtedness. Such promise is deemed original and independent as distinguished from collateral, and the liability created thereby is regarded as the debt of the promisor, and not of the original debtor. If the consideration for such promise is forbearance, it seems that there should be a promise to forbear as well as forbearance in fact, but such promise may be implied as well as express.

OPINION OF THE COURT BY FREAR, C. J.

The question reserved is whether the demurrer to the complaint should be sustained or overruled. The action is assumpsit for \$765.44, the balance alleged to be due upon a promise by the defendant's decedent to pay to the plaintiff the amount of certain notes, secured by mortgage, made by one Kupihea to H. N. Castle, but which, it is alleged, were in fact the property and made for the benefit of the plaintiff. It is alleged that one of these notes was made August 10, 1885, for \$500, and that after certain payments of interest thereon the other note was made February 10, 1892, for \$100, and that it was agreed that it should be secured by the same mortgage; also that said Kupihea died July 6, 1899, without having made any further payment of either interest or principal on either note; and that the defendant's decedent died July 12, 1903. The complaint then continues as follows:

"That prior to the decease of said Kupihea the said W. L. Wilcox represented to the plaintiff that said Kupihea was a relative of his wife and that he was desirous of having the land

turned over to him and would endeavor to have the aforesaid notes paid. That this plaintiff was then preparing to foreclose said mortgage and at the request of and for the benefit of the said Wilcox agreed to postpone foreclosure on condition that the said Wilcox should pay the accrued interest at the rate of Fifty Dollars (\$50) per month until paid. That after the death of said S. K. Kupihea plaintiff thereupon was proceeding to foreclose said mortgage when the said W. L. Wilcox stated to the plaintiff that he was in possession of said land and was cultivating the same with taro or was receiving the products of said land and enjoying the beneficial interest therein at his poi factory and that the said Wilcox desired to secure ownership of the premises and if foreclosure would be delayed he would pay the mortgage as his own debt as soon as he could get title to the property and would pay the interest which was overdue. That in pursuance of said latter agreement on or about the 30th day of June, 1900, said W. L. Wilcox paid Three Hundred and Thirty Dollars (\$330) being five and one-half ($5\frac{1}{2}$) years interest on said Five Hundred Dollars (\$500) mortgage, and Fifty Dollars (\$50) being four (4) years and two (2) months interest on said One Hundred Dollar (\$100) note, and thereafter made sundry payments on account of the interest on both of said notes and promised repeatedly to the plaintiff to pay both the principal and interest stating that he would soon get a deed of the property which he was very anxious to get and that if the foreclosure were delayed he would surely pay the principal, but that he was not desirous of paying it until he had got a deed to the property and at the request of said Wilcox plaintiff refrained from foreclosing said mortgage relying upon said promise. That subsequently to the death of said Wilcox plaintiff has foreclosed said mortgage and realized upon said foreclosure the sum of Sixty-one and 76-100 dollars (\$61.76); and that plaintiff by reason of delaying said foreclosure has been damaged in the sum of Seven Hundred and Sixty-five Dollars and forty-four cents (\$765.44)."

This action was begun April 3, 1905.

The demurrer is based upon five grounds, each of which will be considered briefly.

1. "That no copies of the alleged notes are attached to the complaint as is by law required." The law referred to is section 1721 of the Revised Laws, which provides that every sum-

mons issued under the seal of a court of record shall be served upon the defendant by the delivery to him of a certified copy thereof and of the plaintiff's petition, "to which petition shall always be annexed a literal copy of the voucher upon which it is predicated, (if any there be)," etc. The petition in the present case, however, is not predicated upon the notes in question but, as will appear more clearly hereafter, upon the independent oral promise of the defendant's decedent to pay the amount of the notes as his own debt, such amount being the measure of his indebtedness.

2. "That said notes are barred by the statute of limitations." The action, as already stated, is not upon the notes but upon the independent promise of the defendant's decedent, and it is alleged that that promise was made after the death of Kupihea, which occurred July 6, 1899, and therefore within six years before the commencement of this action. It is immaterial that an action upon the notes was barred, if such were the case, before the promise to pay them, upon which this action is based, was made.

3. "That the promise under which Wilcox is alleged to have assumed the payment of said notes was conditioned upon procuring a deed of said lands to him from Kupihea, which deed, it is not alleged, was ever obtained by Wilcox." The question is whether procuring a deed of the land was intended to be a condition precedent to liability for the debt or whether that was mentioned merely as the time when the debt would be paid. If the promisor's liability was to be conditional upon procuring the deed, the condition was never performed, and never can be performed, owing to the promisor's death, and no cause of action has arisen, but, if, as we hold, procuring the deed was referred to merely to fix the time of payment as a matter of convenience to the promisor, it was his duty to procure the deed within a reasonable time and he could not escape liability by failing to do so, and in case of a contingency by which the deed could never be procured, payment should be made within a reasonable time. There is no doubt that the plaintiff sets forth facts suffi-

cient to show that a reasonable time has elapsed. It is clear from the allegations of the complaint that procuring a deed was not intended as a condition precedent to the attachment of liability on the part of the promisor. It is alleged that he promised to pay the mortgage "as his own debt as soon as he could get title to the property" and afterwards promised "to pay both the principal and interest stating that he would soon get a deed of the property which he was very anxious to get and that if the foreclosure were delayed he would surely pay the principal, but that he was not desirous of paying it until he had got a deed to the property." Under such circumstances payment must be made within a reasonable time. See *Nunez v. Dautel*, 19 Wall. 560; *Crooker v. Holmes*, 65 Me., 195; *Williston v. Perkins*, 51 Cal. 554; *Noland v. Bull*, 24 Ore. 479; *Harris v. Weirick*, 155 Ind. 548; *Alvord v. Cook*, 174 Mass. 120; *Hood v. Hampton P. Ex. Co.*, 106 Fed. 408; *Crass v. Scruggs*, 115 Ala. 258 (22 So. 81); *Culver v. Caldwell*, 137 Ala. 132 (34 So. 15); *Rioux v. Ryegate Brick Co.*, 72 Vt. 154.

4. "That there was no legal consideration alleged in said complaint for the assumption by said Wilcox of the payment of said notes." In the defendant's brief this ground is confused to a large extent with the next ground, under which the question is suggested whether, if there is a legal consideration, it is sufficient to take the promise out of the statute of frauds. It will be considered here without reference to the statute of frauds. That forbearance is or may be a legal consideration needs no citation of authority. In this case the plaintiff forebore to foreclose the mortgage at the defendant's decedent's request and in reliance upon his promise to pay and, even if forbearance to sue upon the notes would not have been a legal consideration for the reason that an action upon them was barred by the statute of limitations, forbearance to foreclose the mortgage would be a legal consideration, for that was not barred. See *Kaikainahaole v. Allen*, 14 Haw. 527. It is true that no definite time was fixed for the duration of the forbearance but in such case it should be for a reasonable time. *Macfarlane v. Sumner*, 1 Haw. 364;

Howe v. Taggart, 133 Mass. 284; *Moore v. McKinney*, 83 Me. 80; *Streeter v. Smith*, 31 Minn. 52; *Shadburne v. Daley*, 76 Cal. 355; *Edgerton v. Weaver*, 105 Ill. 43. This is an application of the general rule that where no time is fixed for the performance of a contract the law implies a reasonable time. *Magnin v. Furgie*, 4 Haw. 467.

5. "That no promise in writing is alleged for the payment of said notes and that the alleged promise of Wilcox for the payment of the same is within the statute of frauds, and is not binding unless in writing." This is the principal point relied upon by the defendant. The contention is that this action is brought upon a "special promise to answer for the debt, default or misdoings of another," within the meaning of our statute of frauds. Rev. Laws, Sec. 1996. Just what promises are within this clause of the statute is a question upon which there is much difference of opinion. Various tests have been adopted by different courts to distinguish between promises within and those without this provision. The fundamental distinction, so far as the present case is concerned, would seem to be whether the promise is to pay the debt of the promisor or the debt of another. The difficulty lies in ascertaining whether the debt is that of the promisor or that of the original debtor. It will be unnecessary to state the various theories or to enter upon a discussion of the numerous conflicting decisions. These theories will be found set forth and many of the cases cited in the text books. See, for example, 2 Page, Contracts, Sec. 611 *et seq.*; Harriman, Contracts, Sec. 578 *et seq.*; 29 Am. & Eng. Enc. of L. 927 *et seq.* If the defendant's promise is original or absolute or primary or independent, as it is variously expressed, and not merely collateral to the obligation of the original debtor, it is not within the statute. This distinction has been recognized by this court in cases in which, unlike the present case, the defendant's promise was made at or before the incurrence of the supposed original or primary indebtedness. *Clark & Henery v. Hackfeld & Co.*, 16 Haw. 53; *Hackfeld & Co. v. Wilson*, 13 Id. 212. It is clear that the mere continued existence of the original debt will not prevent the new

oral promise from being effective. It is equally clear that the mere fact that there is a new consideration for the new promise made subsequently to the incurrence of the original indebtedness is not sufficient to take the new promise out of the statute. The decided weight of authority is also against the theory that the new promise, in order to be without the statute, must be absolute in the sense that the promisor's liability will continue even though the liability of the original debtor ceases to exist, although much can be said in support of that theory. The theory that seems to receive most support in point of authority is that in order to take the new promise out of the statute, it is necessary that the new consideration should move not only from the promisee, which is the ordinary test of a legal consideration (see 2 Langdell's Cases on Contracts, Summary, Secs. 62 *et seq.*), but also that it must move to the new promisor or at least result in or be intended to be a pecuniary benefit to him. In applying this theory much stress is laid upon what may be regarded as the main purpose of the new promisor. If that is to secure some pecuniary benefit to himself it goes far to show, and is generally considered practically conclusive, that the new promise was intended to be primary upon his part and not merely collateral to the liability of the original promisor. This test has been subject to more or less criticism on account of its indefiniteness and elasticity, although it is the test that is now applied by most courts. A leading case in support of this theory is *Emerson v. Slater*, 22 How. 28, which was followed by the same court in the later case of *Davis v. Patrick*, 141 U. S. 479, in which the court says, among other things:

"Whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promise. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As

said by this court in *Emerson v. Slater*, 22 How. 28, 43: 'Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' To this may be added the observation of Browne, in his work on the statute of frauds, section 165: 'The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself.' The thought is, that there is a marked difference between a promise which, without any interest in the subject matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor."

It is sometimes stated, mainly on the strength of *Furbish v. Goodnow*, 98 Mass. 296, that what is called the Massachusetts rule is more restricted, and that under that rule in order to prevent the promise from falling within the statute the consideration must move to the promisor and amount to a relinquishment by the promisee of some lien, right or benefit under the original obligation and the assignment or transfer thereof to the new promisor, and that it is not sufficient that the new promisor should receive some pecuniary advantage and make the promise with that advantage as his main object. It is doubtful, however, if the Massachusetts decisions support that statement. It would seem that the present case at any rate is within the Massachusetts rule as set forth in *Fears v. Story*, 131 Mass. 47, in which a promise made by the purchaser of a vessel to pay a lien incurred upon it by a previous owner, in consideration that the holder of the lien would forbear to enforce the same, but without any relinquishment of the lien or transfer thereof to the new owner, was held sufficient to prevent the promise from falling within the statute. The holder of the lien, as the holder of the mortgage in the present case, relinquished the right to foreclose

immediately, and this inured to the advantage of the owner of the vessel by enabling him to go to sea, just as in the present case forbearance inured to the benefit of the new promisor by enabling him to continue in the possession and cultivation of the mortgaged land and take such steps as he desired in order to procure a deed of the property, although he failed to procure the deed before his death. It is obvious from the allegations of the complaint that the defendant's decedent made the promise for his own advantage and not merely as collateral to the liability or for the benefit of the original debtor.

It is generally held also that forbearance alone without an agreement to forbear is not a sufficient consideration to keep the promise out of the statute, even though the forbearance was induced by such promise; but such agreement may be implied as well as expressed. *Manter v. Churchill*, 127 Mass. 131, and cases there cited. The complaint in the present case sets forth facts sufficient to justify the inference of a promise. We do not mean to say that a promise as well as forbearance is always necessary in order to constitute a consideration of this nature, although, of course, forbearance alone, in order to constitute a consideration, would have to be undergone as a consideration and not merely voluntarily, and, of course, if the forbearance was to be perpetual, there would have to be a promise to forbear, for otherwise the consideration could never be fully performed. 2 Langdell's Cases on Contracts, Summary, Secs. 56-59. But, as already stated, a promise, express or implied, to forbear is generally held necessary, even though the forbearance is to be only for a reasonable time, when forbearance is relied on as a consideration to take an oral promise to answer for the debt of another out of the statute of frauds.

In our opinion the demurrer to the complaint should be overruled and the circuit judge is advised accordingly.

Castle & Withington for plaintiff.

Magoon & Lightfoot for defendant.

V. O. TEXEIRA, A. J. LOPEZ, J. G. PERREGIL, VICTORINO CARREIRA AND MANUEL SOUZA v. THE AMERICAN DRY GOODS ASSOCIATION, LTD., A CORPORATION; L. B. KERR & CO., LTD., A CORPORATION, AND L. B. KERR.

· APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 10, 11, 1905. DECIDED OCTOBER 12, 1905.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE LINDSAY IN PLACE OF HARTWELL, J.

EQUITY—*practice*.

Dismissing a bill on close of plaintiff's case before defendant presents or rests his case is not correct practice in equity.

ACCOUNTING.

A decree dismissing a bill for an accounting brought by minority stockholders of a corporation on the theory of a conspiracy to wreck the same is affirmed on the evidence.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a decree dismissing a bill for an accounting. The suit is instituted by the minority stockholders of the American Dry Goods Association, Ltd., a domestic corporation, against that corporation and L. B. Kerr & Co., Ltd., another and much larger domestic corporation, and L. B. Kerr. The bill is very lengthy, covering some thirty typewritten pages, and contains much that is immaterial. The suit is brought upon the theory that the respondents L. B. Kerr & Co., Ltd., and L. B. Kerr "combined, confederated and conspired together" to acquire the assets, business and good will of the

American Dry Goods Association, Ltd., thus "breaking down the competition" of the American Dry Goods Association, Ltd., with the house of L. B. Kerr & Co., Ltd., and rendering the paid up stock of the complainants of no value and substantially confiscating and converting the same to the use of L. B. Kerr & Co., Ltd., and eliminating the American Dry Goods Association, Ltd., as a competitor with L. B. Kerr & Co., Ltd. The bill alleges that the American Dry Goods Association, Ltd., was formed by Portuguese and that its original stockholders "were all Portuguese, most of them unfamiliar with the English language and none of them familiar with the technicalities of business, especially by corporations;" that it was intended by them in establishing the corporation as far as possible to have the shares of the corporation held by persons of this nationality, and in this way it was believed by them that with the small capital invested, by economy and diligence, the business could be greatly improved and increased so that a good profit upon the amount invested could be realized and distributed among the stockholders; that respondents L. B. Kerr and L. B. Kerr & Co., Ltd., in the prosecution of an alleged conspiracy through officers and employees elected and appointed by them treated and held the property of the American Dry Goods Association, Ltd., and managed and administered its affairs and business "purely as an instrumentality or machinery used by L. B. Kerr & Co., Ltd., to carry out, effectuate and consummate the scheme, design," etc., by the extinction of the competition between the two corporations and the conversion and appropriation of the property, assets and business of the American Dry Goods Association, Ltd., the suspension and destruction of its corporate business and the obliteration of all value from the paid up shares of complainants; that there was illegality in the calling of corporate meetings and election of officers, the illegal passage of by-laws, the failure to properly keep and audit the corporation books, incorrect entries in the minutes of the corporation, and that all the proceedings at such meetings were controlled

and directed by L. B. Kerr & Co., Ltd., aided and abetted by L. B. Kerr, in pursuance of the alleged conspiracy; that there was a consummation of the conspiracy by the conversion and confiscation by L. B. Kerr & Co., Ltd., of the entire property, assets and good will of the American Dry Goods Association, Ltd., and prays for an accounting and a decree awarding complainants \$3,900 (the par value of their shares), or what may be found due them.

After the complainants rested the respondents, without submitting their case, but expressly reserving the right to introduce evidence, moved that the bill be dismissed on the ground that its allegations were not proved, which motion was granted. The proper practice in equity is, that the respondent should be required to rest before his motion to dismiss the bill is entertained. See *Territory v. McCandless*, 16 Haw. 728. But, in view of the conclusion reached, the decree cannot be reversed for that reason.

It appears from the evidence that the American Dry Goods Association, Ltd., was incorporated sometime in June, 1900, with a capital stock of \$9,100, to carry on a general dry goods business. With this \$9,100 it acquired the stock of merchandise and business of the Hawaiian Dry Goods Association, formerly conducted on Fort street, between Hotel and King streets, and continued the business at the same place. The incorporators, desiring to restrict the holders of stock to Portuguese, refused to let Mr. Kerr or any one not a Portuguese into the new concern. After this new corporation had been doing business for about a month, Kerr & Co., Ltd.; acting through Mr. Kerr, acquired forty-seven shares of the capital stock of the American Dry Goods Association, Ltd., which was a little over a majority, thirty of the shares being paid for at par and seventeen at ten per cent. above par, five additional shares being purchased later by Kerr & Co., Ltd. From that time, that is, July, 1900, until sometime in the early part of 1903, the corporation was run by L. B. Kerr & Co., Ltd. A new board of directors was elected, consisting entirely of employees of L. B. Kerr & Co.,

Ltd., the minority stockholders not having a representative, meetings were held at various times, some of which were not called as provided by the by-laws, the proceedings were all had in the English language although formerly in the Portuguese language, and possibly some of the minutes of the meetings were incorrectly kept. The officers who ran the American Dry Goods Association, Ltd., from July, 1900, up to the time of its ceasing to do business were employed at the same time by L. B. Kerr & Co., Ltd. The corporation failed to make any profit during the time of L. B. Kerr & Co.'s management. Finally at a meeting held January 26, 1903, it was decided to move the balance of the stock to the store of L. B. Kerr & Co., Ltd., at the corner of Fort and Queen streets, in order to dispose of it at that place. This was done and the proceeds were used in paying the bills of the American Dry Goods Association, Ltd., there still being an indebtedness due L. B. Kerr & Co., Ltd. Since then the American Dry Goods Association, Ltd., has existed only in name.

But the evidence does not show or tend to show the alleged conspiracy to wreck the American Dry Goods Association, Ltd., thereby eliminating it as a competitor, which constitutes the ground upon which complainants have sought relief. The evidence, if anything, tends to show the contrary. Kerr & Co., Ltd., lost more in doing what it did than it would have if it had originally purchased, as it had an opportunity to do, all of the shares of the American Dry Goods Association, Ltd., and immediately closed up the latter concern. There was no evidence of any undue advantage or any unconscionable bargains between the American Dry Goods Association, Ltd., on the one hand, and Kerr & Co., Ltd., on the other hand, after the latter concern had acquired control of the former. Quite a large amount of merchandise was sold by Kerr & Co., Ltd., to the American Dry Goods Association, Ltd., during the time complained of, but it does not appear that there was anything unfair in this.

It is also objected by complainants that Kerr & Co., Ltd., did not have the right, legally, to acquire shares of stock in

another corporation, but this claim is without merit at this time.

After a careful consideration of all the evidence, we are of the opinion that the decree of the circuit judge must be sustained.

The decree appealed from is affirmed.

H. E. Highton and *E. C. Peters* for complainants.

Kinney, McClanahan & Cooper and *S. H. Derby* for respondents.

ANNIE KEALOHA AND KEONI WILLIAMS v. WILLIAM R. CASTLE, TRUSTEE.

QUESTION RESERVED FROM CIRCUIT JUDGE OF THE FIRST CIRCUIT.

ARGUED OCTOBER 3, 1905.

DECIDED OCTOBER 16, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CHILDREN OF AN ADULTEROUS INTERCOURSE NOT LEGITIMATIZED BY PARENTS' SUBSEQUENT MARRIAGE—*following 4 Haw. 292.*

The plaintiffs being illegitimate children of persons living in adultery who afterwards married, claimed that they were thereby made legitimate under the act providing that "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock." Sec. 2288, R. L.; also claiming that the decision was wrong, 4 Haw. 292, which held that the act did not include children of an adulterous intercourse; also that an instruction given to the trustee by a justice of this Court in 1891 to pay the income to the mother of the children for them on the theory that they had become legitimate by the subsequent intermarriage of their parents, was *res judicata* upon the Trustee through the entire administration of the trust. *Held*: The court is not prepared to hold the decision in 4 Haw. 292, to be wrong and does not see fit to disregard it as a precedent; or to say that if the question were presented *de novo* it would take any other view; and as to

the instruction to the Trustee, there does not appear to have been any contest or issue concerning the legitimacy of the children.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiffs brought a bill in equity in order to compel the respondent as trustee under the will of Joshua R. Williams to pay to them such share of the income of the testator's estate as by the terms of the testator's will would be payable to the children of a deceased child of the testator.

The plaintiffs are illegitimate children of a son of the testator born while their father was living in lawful wedlock with his wife, but after the death of the wife their father and mother intermarried and thereby, as the plaintiffs claim, they were made legitimate under the provisions of the statute that "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock." (Sec. 2288 Revised Laws.)

The bill also avers that in the year 1891 the respondent "applied to the Supreme Court in Probate, said court at that time having jurisdiction at Chambers in matters of probate, for instructions as to the standing of said children, and that he was authorized and instructed by the Honorable Richard F. Bickerton, one of the Justices of said court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents, and that thereafter said respondent as trustee duly made such payments to said Kahalauaola, the mother of said children, in their behalf, until within a year or two past, since which time respondent has utterly refused to make any payments to the said children, or either of them, or to anyone in their behalf, claiming that they were not and are not now entitled to receive any portion of the income or to share in the principal of the said estate to J. R. Williams, deceased."

The defendant having demurred to the bill and the Circuit

Judge being in doubt whether the demurrer should be sustained or overruled, in respect of the construction of the statute referred to and its application to the facts alleged in the bill, reserved for the consideration of this Court the question whether the demurrer should be sustained or not; that is to say, were the petitioners made legitimate by the marriage of their parents subsequent to their birth and thereby rendered capable of inheriting from their father, J. R. Williams, deceased.

The statute in question was held in *Kekula and husband versus Pioeiwa and Paku*, 4th Hawaiian 292 (1880), to be inapplicable to offspring of an adulterous intercourse, the court saying that "any other construction of this Act would be subversive of good morals and we cannot think that the legislature so intended it."

The plaintiffs do not deny that the decision applies to their case, but they claim that it is bad law and ought not to be treated as a precedent, and moreover that the instruction given to the testator by Justice Bickerton makes the matter *res judicata* during the entire administration of the trust estate.

We are not prepared to hold that the *Kekula* decision was wrong. Under the Constitution and laws in force at the time of that decision the court had power to declare a statute unconstitutional which it deemed to be *contra bonos mores*.

An instance of the exercise of this power is *Kinimaka v. Ah Fai*, 3 Haw. 631, in which the court held that a statute is unconstitutional and void as contrary to public policy and morality which enacts that: "No marriage of a Hawaiian woman with a Chinaman shall be invalid by reason of a previous marriage of such Chinaman in China; provided that such marriage shall have been unknown to such Hawaiian woman at the time of her marriage." In the exercise of its discretionary power the court in the *Kekula* case could properly have held that the Act as applied to the facts of that case was unconstitutional because in such application the act would be immoral, or the same conclusion could be reached, and in fact was reached, by considering that the legislature did not intend such application by the Act.

Whether we should take the same view as was taken by the court in that case or not, the decision is a precedent which we do not see fit to disregard. Nor are we prepared to say that if the question were now presented *de novo* we should take any other view of the matter than was taken in that case.

The decision laid down a rule affecting rights of property and it is impossible to say how far it may have affected property rights since acquired.

As to the instruction by Mr. Justice Bickerton, it does not appear that any notice was given of the proceedings or that there was any contest or issue made concerning the legitimacy of children.

The Circuit Judge is advised that the demurrer ought to be sustained.

T. M. Harrison for plaintiffs.

A. G. M. Robertson for respondent.

FREAR, C.J.: I concur on the ground that, although I think the decision in the *Kekula* case erroneous, we ought not to overrule it under all the circumstances.

KOOLAU MAILE, FORMERLY KOOLAU KAIKAINA-HAOLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN W. KAIKAINA-HAOLE, DECEASED, ETHEL H. AND HERMAN M. KAIKAINA-HAOLE, MINORS, BY THEIR GUARDIAN KOOLAU MAILE, AND JOHN KAIKAINA-HAOLE, A MINOR, BY HIS GUARDIAN AD LITEM KOOLAU MAILE, *v.* JOSEPH O. CARTER AND ALLEN & ROBINSON, LIMITED, AND PAUL MUHLENDORF, M. P. ROBINSON, J. O. CARTER AND BATHSHEBA M. ALLEN, TRUSTEES UNDER THE WILL OF SAMUEL ALLEN, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 9, 1905.

DECIDED OCTOBER 16, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MORTGAGE, FORECLOSURE UNDER POWER OF SALE—*accounting not condition precedent.*

A mortgagee is not obliged to render an accounting to the mortgagor as a condition precedent to foreclosure under a power, even though the amount secured by the mortgage was left with him to be applied, and was so applied in part at least with the mortgagor's consent, to the cost of improvements on the mortgaged premises.

Id.—*not barred, though claim against administratrix barred.*

The right to foreclose may not be barred by the statute of limitations, though a claim upon the note against the administratrix is barred.

Id.—*not advertising by posters or selling in parcels.*

Ordinarily, unless required by the mortgage, it is not necessary

to advertise a foreclosure by posters in addition to newspapers, or to sell in parcels a lot mortgaged as a whole.

Id.—*in absence of statute.*

A foreclosure sale cannot be set aside if made in accordance with the provisions of the mortgage, even if the statute relating to foreclosures under powers of sale is unconstitutional in whole or in part.

Id.—*prior entry; equity jurisdiction to set aside sale.*

Assuming that, when a mortgage authorizes the mortgagee upon a breach to enter and foreclose, entry is a condition precedent to foreclosure and that if such entry is not made equity may set aside the foreclosure sale (*Silva v. Lopez*, 5 Haw. 262), it is held in this case that the bill does not clearly show that such entry was not made.

OPINION OF THE COURT BY FREAR, C.J.

This is a bill in equity to set aside a mortgage foreclosure made under a power of sale contained in the mortgage, to compel the purchaser to reconvey the premises to the heirs of the deceased mortgagor, for an injunction against an action of ejectment brought by the purchaser, and for an accounting and order to pay the amount found due on the mortgage. The appeal is from a decree sustaining a demurrer to the bill and dismissing the bill.

The bill covers twenty-three pages besides the exhibits which are made a part of it but the substance of its principal allegations may be stated in a few words. It is brought by or on behalf of the deceased mortgagor's widow and children against the purchaser at the foreclosure sale, the corporation for which he is alleged to have purchased and most of the stock in which the mortgagee is alleged to have owned, and the trustees under the will of the deceased mortgagee. The mortgage permitted a purchase by the mortgagee. It is alleged, among other things, that the mortgagor on May 4, 1895, executed a note for \$2500, payable in four years to the mortgagee, and a mortgage to secure the same, as well as taxes, insurance, expenses, etc., the mortgagor's wife also releasing her dower in the mortgaged prem-

ises, but that the said sum was not received by the mortgagor but was left by him with the mortgagee to be applied, with the consent of the mortgagor, to the payment of the cost of certain improvements upon the mortgaged premises, and that various payments were so made prior to the death of the mortgagor, April 29, 1897, but that there had been no accounting between the mortgagor and mortgagee prior to the mortgagor's death and has been none since between the mortgagee or his legal representatives and the complainants, or any of them; that the mortgagee claimed in his lifetime that the amount due under the mortgage, including principal, interest, costs of foreclosure, etc., was \$3976.85, but that in the absence of an accounting the complainants do not know and have no means of ascertaining whether the said claim was accurate or not; that the mortgagee filed no claim with the administratrix of the estate of the mortgagor; that the statute relating to sales under powers contained in mortgages is unconstitutional and void; that certain affidavits made in connection with the foreclosure are untrue or inaccurate in so far as they relate to entry by the mortgagee prior to foreclosure; that the sale was not conducted fairly or lawfully in that it was not properly advertised and in that the premises should have been sold in parcels instead of as a whole; that the price obtained, \$9,500, was grossly inadequate, and that the premises were of the value of not less than \$16,000; that an action of ejectment is pending for the recovery of the premises by the purchaser; and that certain other proceedings have been brought in the past in connection with the mortgage or foreclosure,—this last allegation being relied upon to rebut any possible presumption of laches.

The relief sought by way of reconveyance, injunction and accounting is incidental, the main relief sought being the setting aside of the foreclosure sale on the ground that it was either void or voidable.

The main contention is that, in view of the uncertainty as to the amount due under the mortgage, the mortgagee should have had an accounting with the mortgagor as a condition precedent

to the foreclosure, even without any request for an accounting by the mortgagor. This contention cannot be sustained. It is not denied that some amount was due under the mortgage and that there had been a breach of condition, upon which, by the terms of the power contained in the mortgage, a foreclosure sale might be had. There is no provision of law, nor is there any provision in the mortgage, requiring an accounting as a condition precedent to foreclosure, whether the amount due is or is not definitely known to the mortgagor, nor is there any provision requiring a statement of the amount due to be made before the sale to the mortgagor or in the notice or advertisement of foreclosure or sale. The mortgagor might have called for an accounting prior to the sale and perhaps have obtained a temporary injunction against the sale pending a suit for an accounting or he might have compelled an accounting of the proceeds of the sale afterwards, but the sale cannot be set aside in consequence of the mere absence of an accounting or offer to account on the part of the mortgagee.

The fact that an action on the note was barred, if such were the case, or that the claim upon it against the administratrix was barred by reason of failure to present the claim within the statutory period would not prevent foreclosure of the mortgage. *Campbell v. Kamaiopili*, 3 Haw. 477; *Kaikainahaulé v. Allen*, 14 Haw. 527; *Castle v. Smith*, ante, 32. This is not disputed, but the fact that the claim against the administratrix was barred is relied upon as an equity in the case in connection with the statutory provision prohibiting the allowance of any claim barred by the statute of limitations (Rev. L. Sec. 1852), the contention being that the mortgagee should not have foreclosed when, as he knew, the administratrix and the widow and minor children were unable to redeem, but that he ought to have filed his claim with the administratrix so that she could have paid the mortgage and thus have avoided a sale of the property at an inadequate price. We cannot say that the parties interested under the mortgagor, after his death, could not have redeemed (see *Kahoomana v. Carvalho*, 11 Haw. 516), or that

it was the duty of the mortgagee to pursue his remedy against the administratrix upon the note rather than his remedy of foreclosure under the mortgage. The alleged inadequacy of the price obtained for the property cannot in itself be considered sufficient cause for setting aside the sale, nor is that contended.

The allegations relied on to show that the sale was not conducted fairly are insufficient. One of these is that the sale was not fully advertised in accordance with custom by posters distributed throughout the city and especially on or in the vicinity of the mortgaged premises. It was not necessary, however advisable, to advertise by posters in addition to advertising in the newspapers, but the affidavit of foreclosure states that the sale was further advertised by printed posters. The other allegation is that the premises were capable of subdivision into eight or ten residence lots and that if sold in such lots they would have brought a much higher price. The premises consisted of a single lot slightly over an acre in area and apparently had never been subdivided. They were described in the mortgage as a single lot and there is nothing in the mortgage to indicate that they should be subdivided for the purpose of a sale on foreclosure. It does not appear in any way that it was a violation of duty to sell the premises as a whole or that the mortgagee was disregardful of the rights of the mortgagor in so selling the premises. See on this point *Cooper v. Island Realty Co.*, 16 Haw. 92, and *Desky v. Booth*, 16 Id. 506, cases of foreclosure by decree in equity.

The contention that the statute in regard to foreclosure under a power of sale (Rev. L. Sec. 2161) is unconstitutional, is based on the ground that the statute should have declared how and where the publication of notice of intention to foreclose and of sale should be made. It requires that the mortgagee shall give notice of his intention to foreclose "by publication of such notice in the Hawaiian and English languages for a period of three consecutive weeks, before advertising the mortgaged property for sale, and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage."

This is construed to some extent by the succeeding section, which, however, need not be considered for the purposes of the present case. Without implying in the least that there is any sound basis for the contention as to unconstitutionality or implying that if the statute were void and the sale also in consequence, equity could set aside the sale, it is sufficient to say that if the statute were void so far as the requirement of publication other than that provided by the mortgage is concerned, the sale might still be sustained as having been conducted in pursuance of the provisions of the mortgage irrespective of the statute or perhaps in pursuance of that portion of the statute which provides that such notices shall be given and such acts done as are authorized or required by the power contained in the mortgage.

Another contention is that no entry was made upon the premises before foreclosure although the mortgage itself expressly provides that upon breach of condition "it shall be lawful for the mortgagee, his administrators and assigns to enter into and upon all and singular the premises hereby granted, and to sell and dispose of the same," etc. Opposing counsel urge that if entry was a condition precedent and there was no entry, that may be set up by way of defense in the action of ejectment and affords no ground for an exercise of equity jurisdiction. We will assume, however, that not only was entry a condition precedent but that failure to comply with that condition would justify a court of equity in setting aside the sale and the conveyance made in pursuance thereof—for the purpose of removing from the title a cloud that was not apparent upon the face of the conveyance or the affidavit of foreclosure sale or on the ground that the trust relation existing between the mortgagor and mortgagee, even after sale, especially if the purchaser was acting for the mortgagee, conferred equity jurisdiction. *Silva v. Lopez*, 5 Haw. 262, may, perhaps, be considered an authority upon both of these points. The decision in that case upon the point that the entry was a condition precedent followed certain Massachusetts cases there cited, which have been followed in the more recent case of *Foster v. City of Boston*, 133 Mass. 143,

although, perhaps, the majority of courts elsewhere disagree with the Massachusetts court. See 2 Jones on Mortgages, 6th Ed., Sec. 1782. Of course, whether entry is a condition precedent or not depends upon the particular language of the mortgage. Certain distinctions are made in this respect in the Massachusetts cases. It will be noticed that in the present case the mortgage requires entry alone and not taking possession also as was required in the *Silva* case. Our decision upon this contention rests upon the allegations of the bill. The allegations that no entry was made, in so far as there are any such allegations, are made in connection with a certificate of entry and an affidavit of foreclosure, which were made and recorded on behalf of the mortgagee. The certificate of entry was made by two witnesses to the effect that C. S. Dole, acting as agent for the mortgagee, in their presence peaceably and openly took possession of the premises for the purpose of foreclosure and sale under the power of sale contained in the mortgage. This certificate appears to have been made several months before the sale, but whether it was intended as a certificate for the purpose of foreclosure by entry under section 2166 of the Revised Laws, as a portion of it seems to indicate, or was intended to show an entry for the purposes of foreclosure by sale under the power contained in the mortgage, as another portion seems to indicate, is not clear, but neither the statute nor the mortgage required any such certificate to be made in connection with a sale under the power contained in the mortgage, and for the purposes of the present case it is immaterial what that certificate sets forth or for what purpose it was intended. The affidavit of foreclosure is the affidavit required by section 2163 upon a foreclosure by sale under the power contained in the mortgage. The allegation of the bill in regard to this is merely, upon information and belief, that the affiant was "mistaken" in his affidavit and that the affidavit is "inaccurate" in stating that "he did, acting under a power of sale contained in said mortgage, enter into and upon all and singular the mortgaged premises and foreclose said mortgage for condition broken, to wit: nonpayment of

principal and interest." This is a mere allegation of inaccuracy upon information and belief. It is not stated in what the inaccuracy consisted. From the argument and brief we infer the claim to be that it consisted in the statement that the affiant himself, who was the attorney at law and agent of the mortgagee, entered, etc., instead of the statement that the mortgagee or the affiant on behalf of the mortgagee so entered, etc. As we read the affidavit, a copy of which is made a part of the bill, it shows that the affiant entered by the authority and on behalf of the mortgagee. Even if it should be construed as showing merely that the affiant entered on his own behalf, the allegations of the bill would still be insufficient because it does not clearly appear from the bill as a whole that the mortgagee did not in fact make the requisite entry through the affiant or any agent. If the affidavit was inaccurate in stating that the affiant entered on his own behalf, this would tend to support the view that the accurate statement would have been that he entered on behalf of the mortgagee.

H. E. Highton and C. W. Ashford for plaintiffs.

Kinney, McGlanahan & Cooper for defendants.

MOSE MEHEULA *v.* PIONEER MILL COMPANY,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED OCTOBER 3, 1905. DECIDED OCTOBER 18, 1905.

HARTWELL AND WILDER, JJ., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF FREAR, C.J.

DEED—*description of property.*

A deed granting "the whole of that piece of land mauka Uhao by name and a part of the piece makai here being the portion of

the land remaining out of my sale to Samuela o Bartow" is sufficient under the circumstances of this case to convey the property in dispute.

Id.—*acknowledgment.*

As between the parties acknowledgment of a deed is not necessary.

NEW TRIAL.

Rulings on questions during cross-examination of witnesses, on the allowance of amendments to pleadings and on the offering of evidence by the plaintiff after the defendant has rested, are largely in the discretion of the trial court and do not warrant a new trial unless such discretion is abused.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment for a piece of land at Uhao, Lahaina, Maui, being Apana 2 of royal patent 1678 land commission award 3422 B to Kekahuna. Defendant pleaded the general issue. The case was tried by the circuit court, jury waived, judgment being rendered in favor of plaintiff, and comes here on defendant's exceptions.

The first exception is to the admission of a copy of a deed from Hoone to Halulukahi, dated August 18, 1862, and recorded in Liber 15, page 376, this deed being in plaintiff's chain of title. The objections to the deed were: (1), that there was nothing in the deed to show that it had any reference to the property in dispute; (2), that the certificate of proof fails to show that the maker of the deed, Hoone, was dead at the time the alleged proof was made, or that she was not in the country, or that she refused to acknowledge; (3), that the certificate of proof fails to show that Kenui, the witness, was sworn by the officer before whom the proof was made; (4), that the certificate of proof fails to show that the witness, Kenui, was acquainted with Hoone; and (5), that the deed offered was not a certified copy or a true copy. The first objection is overruled. The deed purports to convey "the whole of that piece of land mauka Uhao by name and a part of the piece makai here being the portion of the land remaining out of my sale to Samuela o Bar-

tow." It also appeared that the grantor acquired this land under the will of her husband, the original awardee, the award and patent having previously been introduced. There was sufficient to show that it purported to convey the property in dispute. The second, third and fourth objections relate to the certificate of proof on the deed intended to take the place of the acknowledgment. Defendant claims that the deed is void because the certificate of proof did not conform to the statute as provided in Sec. 2361 of the Rev. Laws. These objections are without merit for the reason that they do not affect the validity of the deed. Even if the deed had no acknowledgment, or its equivalent, at all, it would still be good between the parties. As between the parties acknowledgment of a deed is not necessary. *Laanui v. Puohu*, 2 Haw. 161. The fifth objection is not urged in the brief, and must be regarded as abandoned. Exception 1 is overruled.

The second, third and fourth exceptions relate to the following questions put to plaintiff on his cross-examination:

"I now ask the witness to explain to us what land was referred to in this lease, wherein he says, 'that portion of land in Uhao, which was sold by Kekahuna to S. Kamoahakau are (is) not included in this lease.'"

"Do you remember of making this exception in the lease, to-wit: 'That portion of land in Uhao which was sold by Kekahuna to S. Kamoahakau are (is) not included in this lease?'"

"Is it not a fact that after this lease was written, all except the last five lines preceding your signature the lessee disputed your right to lease the land for which you are now suing and thought that the third piece of land mentioned in the lease might be construed to be the land in question, and instead of drawing a new lease this exception clause was inserted with the understanding on your part and the lessee's that it did except the land in question?"

An objection by plaintiff's counsel to each one of these questions was sustained. The lease referred to was from the plaintiff to defendant's predecessors, dated January 10, 1890, demising "that certain piece or parcel of land in Uhao, Lahaina, Island of Maui, through which the railroad track runs, and

containing an area of 1 07-100 acres." In this lease just before the signature were these words: "That portion of land in Uhao which was sold by Kekahuna to S. Kamoahakau are (is) not included in this lease." Defendant claims that it should have been allowed to ask these questions because afterwards plaintiff disclaimed as to the piece mentioned at the end of the lease, and these questions related to the extent of the disclaimer. The right to ask the questions, if it existed at all, existed at the time the questions were asked and not by reason of anything arising afterwards. In any event, we cannot say that the lower court erred in refusing to allow these questions. In the cross-examination of witnesses considerable discretion must be left to the trial court. *Merricourt v. Insurance Co.*, 13 Haw. 218. Exceptions 2, 3 and 4 are overruled.

Exceptions 5 and 6 relate to the disallowance of two questions asked plaintiff on cross-examination, which questions were as follows: "How large a piece of land is Uhao?" "Is this land for which you bring suit all of the land of Uhao?" These exceptions are overruled. It was discretionary with the trial court to disallow them, and it does not appear that any harm resulted to the defendant by reason of the ruling.

The seventh exception is to the overruling of defendant's motion for a non-suit on the ground that plaintiff had not shown title in himself for that the deed from Hoone to Halulukahi (referred to in exception 1) did not convey or purport to convey the land in dispute, and because the description in said deed was uncertain, indefinite and ambiguous. This exception is covered by the ruling on exception 1.

The eighth exception relates to the offering of evidence by plaintiff after the defendant had rested and plaintiff had been allowed by the court to amend his declaration so as to claim less land. It was within the discretion of the trial court to allow the amendment. See Sec. 1738 of the Rev. Laws and note. The evidence offered was for the purpose of identifying the portion of land not claimed under the amendment. The objection was on the ground that defendant had rested its case, had

sent its witnesses home, and was not then in a position to renew the contest on issues as they would be framed under the amended declaration. By the amendment no new issues were framed. Plaintiff simply relinquished his claim to a part of the land sued for. Defendant did not move for a continuance in order to get its witnesses back. However, this was a matter in the discretion of the trial court, and, it not appearing that such discretion was abused, this exception must be overruled.

The ninth exception is to the allowance of evidence for plaintiff in rebuttal, the objection being that it contradicted his evidence in chief. The evidence was for the purpose of making certain that which was not claimed against the defendant. We cannot see how the defendant was prejudiced by the court's allowing plaintiff to show that he claimed less than he did originally. This exception is overruled.

The tenth exception, which was to the refusal of the court on defendant's motion to strike plaintiff's amended declaration from the files, is covered by the ruling on exception 9, and should be overruled.

The last exception is that the decision was contrary to the law and the evidence and the weight of evidence. Defendant claims that a certain partition deed in plaintiff's chain of title was not admitted in evidence and in consequence his title was not proved. At it appears from the findings of fact by the trial court that this deed was duly proved, and as the deed itself purports by endorsement of the clerk to have been received in evidence, this exception is overruled.

The exceptions are overruled.

C. W. Ashford and James L. Coke for plaintiff.

D. H. Case for defendant.

W. R. CASTLE, TRUSTEE, v. KAPIOLANI ESTATE,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 5, 1905.

DECIDED OCTOBER 18, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ESTOPPEL—landlord—judgment against tenant.

A landlord is not estopped as against the plaintiff by a judgment against his tenants in an action of ejectment against himself and them, by reason of his knowledge of the action and opportunity to defend them but making no defense for them.

ESTOPPEL IN PAIS—no basis for plaintiff's claim in ejectment.

A plaintiff in ejectment cannot establish his title on the basis that the defendant is estopped by his conduct from disputing it.

NON-SUITING A CESTUI QUE TRUST WHO WAS CO-PLAINTIFF.

A cestui que trust probably should not be joined as co-plaintiff, but as she presents no exception to her non-suit, and it does not appear that any right of the other plaintiff was thereby affected, the question of its correctness is not properly presented.

EVIDENCE.

The ruling in 16 Hawn. 435 upon the admissibility of the evidence of F. M. Hatch is applicable in this case. The record in the former ejectment case was properly admitted upon the question of adverse possession.

DIRECTED VERDICT—power to review in absence of all the evidence.

An exception to a direction of a verdict for the defendant may be passed on by this court, although the entire evidence is not incorporated in the bill of exceptions, if the trial judge in allowing the bill has certified that it contains all the evidence necessary for passing the exception.

OPINION OF THE COURT BY HARTWELL, J.

This was ejectment by Ai and Castle, trustee. At the close

of the plaintiffs' case, Ai was non-suited. At the close of the evidence the court on motion directed a verdict for the defendant "on the ground that the evidence shows an estoppel by former judgment," to which ruling the plaintiff excepted.

The former judgment was in an action of ejectment for the land claimed in this case brought by the present defendant against Castle and Weaver and Hoogs. The defendant, Castle, filed a general denial, but the defendants, Weaver and Hoogs, Castle's tenants, were defaulted. Jury having been waived, the court ordered judgment for the plaintiff, who entered judgment against Castle, and a separate judgment upon their default against Weaver and Hoogs. The judgment against Castle was set aside on error on the ground that separate judgments cannot be made in a joint action. The plaintiff obtained possession of the land, by a writ issued on the judgment against Weaver and Hoogs, and the defendant, Castle, brought this action.

The estoppel claimed is not that of the reversed judgment against the plaintiff, but of the judgment against his tenants, the plaintiff having had full knowledge of the action and opportunity to defend it in behalf of the tenants as well of himself. Notices and stipulations concerning all the defendants filed in the case by Castle and Weaver who were law partners, are pointed out as showing that Castle treated the case against the tenants as his own, although making no defense for them.

The defendant claims that the rule is that, when one has an opportunity to defend a case in which he has an interest, he is bound by the judgment whether he makes a defense or suffers the case to go by default, that in ejectment against a tenant, if the latter requests his landlord to defend, the latter is bound by the judgment whether he defends the case or not, and that the circumstances of this case dispensed with need of such request.

The right of a landlord to defend in a tenant's name does not imply that he owes to the plaintiff a duty to defend. If a plaintiff wishes to secure a judgment to bind the landlord, he must make him a party, since in no other way can he compel him to appear or become defaulted. If the plaintiff does not do this,

he takes the risk that the landlord may not appear voluntarily. A judgment in ejectment includes parties who are summoned, or who voluntarily appear, but does not include a landlord who is not impleaded or does not defend in the tenant's name or his own. The tenant's request that he defend would not place him under obligation to the plaintiff to do so nor enable the plaintiff to obtain a judgment which would be *res judicata* upon his title.

At common law as well as by an early English statute, a landlord may be admitted to defend if the tenant requests him to do so. If he then fails to defend, the judgment is conclusive against him in favor of the tenant on the question of eviction. There is no rule of law, however, that if when made a co-defendant, and thereby given full opportunity to defend his title, he fails to defend the tenant he is as against the plaintiff bound by a judgment against the tenant. The law imposes on the landlord no duty to the plaintiff to defend the tenant and the plaintiff has no right based on contract to require him to do so, hence his failure to defend cannot estop him from asserting his title in his action against the plaintiff.

Undoubtedly there are cases in which one is bound by a judgment against another in an action in the subject or result of which he has an interest, provided he is called upon by the defendant to defend the action or has an opportunity and the right to defend it. As an example,—in *Robbins v. Chicago City* 4 Wall. 657, a person who had been injured by an excavation in a street had obtained judgment against the city in the sum of \$15,000.00. The city having been compelled to pay the judgment, brought an action to recover of the defendant, who caused the obstruction, the amount of the judgment and expenses of the litigation. The jury was instructed that if the defendant knew that the suit was pending and could have defended it and it was through his fault that the party was injured, he was concluded by the judgment against the corporation. This instruction was held to be correct, the court saying that "all who are directly interested in the suit and have knowl-

edge of its pendency and who refuse or neglect to appear and avail themselves of those rights are equally concluded."

Boston v. Worthington, 10 Gray 496; *Littleton v. Richardson*, 34 N. H. 187, are to the same effect, the rule being stated that "when a person is responsible over to another either by operation of law or by express contract and he is duly notified of the pendency of the suit and requested to take upon himself the defense of it, he is no longer regarded as a stranger because he has the right to appear and defend the action and has the same means and advantages of controverting the claim as if he was the real and nominal party upon record."

Washington Gas. Co. v. Columbia, 161 U. S. 329, which affirms *Robbins v. Chicago*, states the rule, we think, more accurately as follows: "As a deduction from the recognized right to recover over, it is settled that where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action." And see *Oceanic Co. v. Campania*, 144 N. Y. 663. In cases like those above cited the judgment against the nominal party is conclusive upon the person liable over in an action brought against him by that nominal party. A like rule appears to have been applied in *Castle v. Noyes*, 14 N. Y. 329, and *Peterson v. Lothrop*, 34 Pa. 223. In *Burns v. Gavin*, 118 Ind. 320, the plaintiff had litigated the matter in a former suit, although in the name of one who was only nominally interested. "It is sometimes said that the landlord or lessor is not bound in such a case if he has no notice or unless he has notice of the action, but such language is misleading as it implies that he will be bound if he does have notice, which is not the case." 2 Van Fleet, Former Adj., 1072. The same author, referring to *Thomas v. McCormick*, 136 Ill. 135, which sustains a contrary view, says that it seems to him that the Illinois cases are wrong.

We have carefully examined all of the defendant's citations, but are unable to find in them anything which leads us to modify the views which we have above expressed. The exception to

the order directing a verdict for the defendant on the ground of estoppel is accordingly sustained. We can properly pass upon this since, as certified by the trial judge, all the evidence necessary to determine it is before us.

We summarize from the plaintiff's brief the other exceptions as follows: (1) non-suiting Ai; (2) rejecting Mr. Hatch's evidence that he appeared for Kapiolani in *Okuu v. Cummins*, and the rejection of the record in that case; (3) admission of the record in *Kapiolani v. Castle*; (5) refusal to direct a verdict for the plaintiff on the ground of an estoppel in pais by reason of the representations of Kapiolani and on the further ground that a case of adverse possession was made out. None of these exceptions are sustained. Probably the *cestui que trust* should not have been joined as co-plaintiff, but as she presents no exception to the non-suit and it does not appear that any right of the other plaintiff was thereby affected, the question of its correctness is not properly before us. The ruling in 16 Haw. 435 upon the admissibility of Mr. Hatch's evidence is applicable to the present case. The record in the former ejectment case was properly admitted if for no other purpose upon the question of adverse possession. There is no rule which enables a plaintiff to recover in ejectment on the claim of an estoppel in pais. Bigelow on Estoppel, 599. We are unable, from what appears in the bill of exceptions, or from the transcript of evidence accompanying it, to say that as a matter of law a case of adverse possession was made out for the plaintiff upon clear and undisputed evidence.

Upon the ground of the exception which is sustained, as above, the judgment is vacated,—new trial is ordered and case remanded.

Castle & Withington for plaintiff.

Kinney, McClanahan & Cooper for defendant.

M. F. SCOTT AND NETTIE L. SCOTT *v.* H. HACKFELD
& COMPANY, LTD.

APPEALS FROM CIRCUIT JUDGE, THIRD CIRCUIT.

SUBMITTED OCTOBER 16, 1905. DECIDED OCTOBER 18, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CANCELATION—mistake—degree of proof.

A clear case should be made out in order to justify the cancellation of a note and mortgage made in pursuance of part of an oral contract, on the ground of mutual misunderstanding or mistake as to another alleged part of the contract which was not intended to be put in writing. A mere preponderance of evidence is insufficient.

OPINION OF THE COURT BY FREAR, C.J.

On October 1, 1902, the plaintiff M. F. Scott, being indebted to the defendant in the aggregate sum of \$1908.27, on two book accounts, as collateral to one of which the defendant held two due bills, executed at the request of the defendant a note for that amount and a mortgage of certain lands to secure it. His wife, the other plaintiff, joined in the note and mortgage. Part of the mortgaged property belonged to her. On September 19, 1904, this bill was brought for the annulment of the mortgage and incidentally to enjoin a foreclosure which the defendant was instituting under the power of sale contained in the mortgage. The defendant filed an answer and also a cross-bill asking for an accounting and a decree requiring the plaintiffs to pay the amount found due and in default of payment that the mortgaged premises be sold and the proceeds applied, etc. The circuit judge, after a hearing, decreed that the note and mort-

gage were void and enjoined the defendant from enforcing them and, in order to settle the whole controversy having once acquired jurisdiction, found the amount then due from the plaintiff M. F. Scott to the defendant and entered judgment therefor as well as for one half the expenses of the mortgage, costs of advertising and costs of court, amounting in all to \$939.41. Plaintiffs and defendant both appeal.

The theory of the plaintiffs is that the note and mortgage were given on condition that the due bills should thereupon be assigned back to the plaintiff M. F. Scott, and that the note and mortgage should now be annulled because that part of the consideration was not performed by the defendant. The plaintiffs do not seek to enforce such performance or to have the note and mortgage reformed so as to make them accord with the contract as they claim to have understood it, nor, indeed, is it disputed that the note and mortgage were drawn and executed precisely as intended by both parties at the time. The specific prayer of the bill is that the mortgage be declared null and void for want of consideration. The circuit judge, however, did not sustain that theory, and in that he was quite right as we think, but, perhaps under the general prayer for further and other relief, decreed an annulment on the ground of mistake—finding that the plaintiffs understood that the due bills were to be assigned back upon the execution of the note and mortgage but that the defendant understood the contrary, in other words, that the minds of the parties never met in respect to a portion of the antecedent oral contract which was not intended to be executed in writing. The plaintiffs state in their brief that they do not accept the court's theory of a misunderstanding, although they state also that that theory is sufficient to establish the voidability of the note and mortgage.

The defendant contends that there was not sufficient proof of want of mutuality in the understanding of the parties to justify a decree of annulment of the written note and mortgage and cites authorities for the purpose of showing that proof in cases

of this kind should be clear and convincing and that a mere preponderance of evidence is insufficient. No doubt a very strong showing should be made in order to justify a reformation of a contract on the ground of mistake in its execution, that is, on the ground that it does not express the contract that was made, or even to justify a cancelation of a written instrument on the ground that there was no meeting of the minds in the supposed antecedent oral contract, or in order to justify a cancelation of a written portion of a supposed contract, or an instrument made in pursuance of a portion of a supposed oral contract, on the ground that the minds of the parties did not meet as to another portion of the contract which was not intended to be reduced to writing. See 2 Pom. Eq. Jur. 3d Ed., Sec. 859; 6 Cyc. 336; *Maxwell Land-grant Case*, 121 U. S. 325, 381; *Godfrey v. Kidwell*, 15 Haw. 351, 355. Perhaps different degrees of proof may suffice in the different cases mentioned. Some courts go to the extent of saying that proof in the first case at least, that is, in order to justify the reformation of an instrument on the ground that it does not conform to the original contract, should be beyond a reasonable doubt, but this is putting it too strongly. See 17 Cyc. 771-773. We can say, however, that a clear case should be made out in order to justify the cancelation of a note and mortgage made in pursuance of one portion of an oral contract, on the ground of mistake as to an alleged other portion.

The decree appealed from was based on the finding that Scott and Hime, the defendant's agent in this matter, were equally positive, the one that the reassignment of the due bills was to be part of the consideration for the execution of the note and mortgage, and the other that such was not the case; that Scott's testimony is supported by Mrs. Scott's statement that she was familiar with her husband's business and that immediately after Scott's agreement with Hime she was informed by Scott that the claims were to be returned and that if such had not been the plan she certainly would not have executed the note and mortgage; and that the appearance of these witnesses did not

indicate that any of them were falsifying; and the conclusion that the most natural explanation of all the circumstances is that there was a mutual misunderstanding between Scott and Hime. We hardly think this a sufficient showing for setting aside the note and mortgage, especially in view of other circumstances to which reference will be made. Hime knew nothing of Scott's statement to Mrs. Scott, and Scott's testimony as well as Hime's, is that of an interested party. This testimony was given more than two years after the transaction. Although it is stated in the summary of the evidence that Scott demanded the return of the due bills without unnecessary delay, the defendant refused to give them up and continued to collect payments upon the same and apply them to the book accounts, apparently with Scott's knowledge. It may be stated here that the plaintiffs contend not only that the due bills were to be reassigned, but also that the book accounts were to be canceled, while the defendant claims that the note and mortgage were to be simply further security for the book accounts. On December 22, 1903, Scott made a written offer of settlement of the note and mortgage in which he also states that before he would do so the consideration for which the note and mortgage were given should be rendered, namely, the discharge of the book accounts and "also the surrender of other securities furnished you," describing the due bills, and that payments made upon the due bills since the execution of the note and mortgage should be applied to the note and mortgage and that any amount as yet unpaid on the due bills should be credited on the note and mortgage and the defendant retain the due bills, and also that any other payments or accounts should be credited on the note and mortgage. Certain other credits had been allowed including one cash payment of \$120, made August 27, 1903, apparently long after the refusal to surrender the due bills. To this offer the defendant replied two days later that it would be most happy to render a discharge of the notes, book accounts and mortgage, on payment of the same, and return at the same time the securities that had been deposited with it, and enclosed a statement of the two book

accounts. Plaintiffs erroneously understood the defendant's reply to be a demand that the note should be paid in addition to the book accounts. The summary of the evidence states that since that date plaintiffs have not admitted the validity of the note and mortgage.

In view of the nature of the testimony at this late date as to what statements were made orally between Scott and Hime prior to the execution of the mortgage and Scott's subsequent conduct and statements prior to the filing of this bill, it does not seem sufficiently clear that there was a misunderstanding of the parties to justify the annulment of the note and mortgage. It may be that Scott's memory is at fault as to just what was stated at the time of the agreement and that, as some of his subsequent statements and acts tend to show, the agreement was that the book accounts should be canceled and the due bills reassigned not upon the execution but upon the payment of the note and mortgage, or that Scott's present view is merely his construction upon what was actually stated at the time of the original agreement. However that may be, he has not made out a clear case for the annulment of the note and mortgage. It is unnecessary to consider whether the doctrine of estoppel, or laches or ratification would preclude the plaintiffs from obtaining the relief desired, if they had made out a case otherwise. The other portions of the decree naturally fall with the portion relating to annulment.

The decree appealed from is reversed and the case remanded to the circuit judge for such further proceedings as may be proper.

Plaintiffs in person.

Thompson & Clemons and G. F. Maydwell for defendant.

JOHN A. CUMMINS v. JOSEPH O. CARTER, TRUSTEE; KAUMAKAOKANE, THOMAS AND JOHN T. WALKER; MATILDA W. CONSTABLE, JANE P. C. MERSEBERG, KING THOMAS, TERRILLA M. JOY, MALIE M. BLAISDELL; JAMES, MAY, JANE, MATILDA, CHARLES, ABIGAIL, IDA, WILLIAM, HELEN AND MADELINE MERSEBERG, MINORS; THOS. P., JOHN A., THOMAS, RAPLEE, MOSELEY AND WOOD CUMMINS; CHARLES MAHOE, FLORA HIRAM AND MAY C. KIBLING.

APPEALS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 2, 1905. DECIDED OCTOBER 23, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

DURESS—*threats do not constitute, unless operative.*

A bill to set aside a trust deed on the ground that it was procured from the petitioner by threats made by his wife's attorneys that if he did not agree upon a separation and make provision for her she would institute proceedings for divorce or separation or to place him under guardianship as a spendthrift and in such proceedings expose his whole manner of living, the fact being that he was then living with another woman, cannot be sustained, even if the threat of exposure in addition to the threat of civil proceedings might in itself constitute duress, when the bill shows also that the petitioner was able to resist the threats and executed the deed not because he was overcome by them but in reliance upon advice given at his request by his confidential friend and agent.

MISTAKE—as to scope of deed, due to ignorance of English language or legal phraseology, not sufficient.

A trust deed made for the benefit of the maker and his family cannot be set aside on the ground that the maker did not fully realize its scope or effect on account of his imperfect knowledge of English or legal phraseology. He was not mentally weak, no fraud was practiced on him, the deed was read to him, and he trusted his agent's advice that it was all right. It was his duty to have

had it translated or explained to him or take the consequences.

UNDUE INFLUENCE—*presumption of, from relation of principal and agent, rebutted by other allegations of the bill.*

The presumption, if any, that a trust deed made by a principal for the benefit of himself and his family was procured by the undue influence of his agent, from the mere fact that the agent who had previously been in charge of the entire estate was to be trustee under the deed, is slight, and is held to be rebutted in this case by other allegations of the bill.

OPINION OF THE COURT BY FREAR, C.J.

This is a bill in equity for the cancelation of a trust deed on the grounds of duress, undue influence and mistake. The case comes here on appeals from a decree sustaining demurrers filed by the several defendants and dismissing the bill.

The trust deed was made October 1, 1896, between the petitioner as party of the first part, his then wife Kahalewai, who died September 10, 1902, as party of the second part and the defendant Carter as party of the third part. The other defendants are joined as parties claiming interests under the deed.

The allegations made chiefly in support of the ground of duress are substantially as follows: That in the latter part of September, 1896, W. A. Kinney, as attorney at law for Kahalewai, called on the petitioner at his residence and informed him that she had left him "for good," that she was determined to get a divorce or separation and a division of the property, that if petitioner would agree to a division of the property and a separation publicity would be avoided, and demanded with emphasis that such agreement be made then and there, but that the petitioner declined so to do, whereupon Kinney stated in substance that they could prove in open court that the petitioner was keeping a fast house, a gambling house, and was dissipating his property and that his whole manner of living would be exposed in court; that the petitioner was then and for some time had been living in the society of and having improper intimate relations with a woman not then his wife, and thought

that this was what Kinney referred to when he spoke of exposing the petitioner's whole manner of living; that such threat created a fear in the petitioner's mind that such improper relations would be so exposed if he failed to accede to the demand; that petitioner was averse to a separation and division of the property and had always prior thereto lived in good friendship with his wife, and feared such exposure, and desired to protect from the disgrace thereof the said woman not his wife and his children and grandchildren, and that he had shortly theretofore suffered financial reverses and feared that the bringing of the threatened proceedings would entail large expense which he was ill able to bear; that in consequence of these fears and desires he was unable at that time to refuse absolutely to accede to the demand, and replied that he could not agree to anything at that time or until he could consult with his friend and agent, the defendant Carter, which he would do the following morning; that on the following morning he called on Carter and found Kahalewai's attorneys in conversation with him; that said conversation continued with very little attention paid to the petitioner, and that after the departure of the attorneys the petitioner told Carter the threats made to him and his fear and dread engendered thereby; that Carter then informed the petitioner that the attorneys had represented to him that the petitioner was living too fast and was improvident and dissipating his property and that he must make some division of his property so as to give his wife certain property or income for her support and that on failure to do so proceedings would be instituted on behalf of the wife to have petitioner placed under guardianship as a spendthrift, and that the attorneys, after talking with Carter, wanted petitioner to make a trust deed of his property so that the wife could be provided for; that the petitioner was not then dissipating his property but was living within his income and that his real property was unincumbered; that he believed that if he declined to make such deed the proceedings for placing him under guardianship would be instituted to his disgrace, and that he feared that as part of

such proceedings an endeavor would be made to expose the petitioner's improper relations with the said woman not his wife, and that he believed that such threats were made by the attorneys with the purpose of coercing the petitioner into acceding to their demand; that, as alleged on information and belief, Carter at his conversation with the attorneys agreed with them to assist them in procuring a trust deed in which provision would be made for the petitioner's wife and also other provisions relating to his property and its management not demanded by the attorneys but suggested by and acceptable to Carter; that petitioner is of half Hawaiian and half English blood and could speak and write only simple English in addition to the Hawaiian language and was without experience in business matters and was dependent upon the advice of others in such matters and at that time and long previously had been so dependent upon the advice of said Carter, with whom he had placed the entire management of his property and business affairs and in whom he had the fullest confidence; that Carter was a man of commanding presence and shrewd, strong and aggressive character and wide and valuable experience in business and that petitioner believed that he was learned in the law; that petitioner being sorely distressed by the demands and threats made and in dread of exposure as threatened, and relying upon Carter, asked Carter's advice concerning said demand and the course that the petitioner should follow with respect thereto and that Carter advised him that he thought the making of a trust deed would be the best thing that the petitioner could do; that the petitioner was greatly averse to doing so, but that, by reason of his great fear that he and his children and the woman would be exposed to disgrace in such divorce or separation or guardianship proceedings through the exposure of the petitioner's private life, he executed, against his free will and consent and under such constraint and duress, the trust deed in question and that such constraint continued until after the death of his wife Kahalewai.

The allegations made chiefly in support of the ground of mistake are substantially as follows: That the petitioner did not

at the time he executed the trust deed understand its provisions but relied upon Carter's advice and did not have or seek and was not advised to seek any legal advice as to the advisability or legal effect of the deed, but stated to Carter that he would make the trust deed if Carter thought best; that the petitioner thought that the deed was to be only for a special purpose, as for the payment by the trustee of certain debts or charges out of the income to be received by the trustee, and that the difference between an agent and a trustee did not seem great to him, and that he consented to make the trust deed knowing that Carter, who had been his agent, was still to be in charge of his property as trustee; that the deed was drawn by the attorneys and that Carter, after procuring certain changes and alterations to be made therein, stated to the petitioner that it was "all right" and then read the deed to the petitioner in the English language, but without commenting thereon; that the petitioner, although fairly understanding simple English, did not have a clearer understanding of the provisions of the deed after it was read to him than before; that he believed the only purpose of the deed was to secure his then wife a monthly allowance of \$150 during her life by giving the property into the charge of Carter as trustee and that on the death of the wife the purpose of the deed would be fully accomplished; that the petitioner did not realize that the deed was irrevocable or would or could against the petitioner's will extend beyond his wife's lifetime but believed that after his wife's death he would be entitled to the property and the income thereof, should he then be living and desire the same; that he was not advised to have a clause of revocation inserted or that the deed would prevent or defeat any testamentary disposition should the petitioner survive his wife, and that he believed that the deed in all respects, except as to the provisions for the benefit of the wife, were in the nature of a testamentary disposition of his property to take effect upon his death should he die before his wife; that he did not realize the gravity or effect of the deed but suffering under the dread aforesaid relied on the advice of Carter to aid and assist him for his best interests;

that petitioner now believes that Carter's advice to him and acts in aiding the attorneys were unfair, disadvantageous and prejudicial to him and that he was ill advised and allowed by Carter to entertain a mistaken belief concerning the deed and that the acts and doings of said Carter unduly influenced him into a mistaken belief as to the effect of the deed whereunder he executed it; that such belief continued until February, 1903, when, his wife having died and he having married the said woman with whom he had had improper relations, the petitioner desired to have Carter continue to receive the income of the property and pay certain of it to his said present wife during her lifetime, should she survive him, but was informed by a friend of his, a notary public, that the deed was irrevocable and that the petitioner had only the right thereunder during his lifetime to receive the net profits; that the petitioner relied upon such advice until April, 1904, when, by reason of his increasing desire to make provision for his present wife in the event of petitioner's death during her lifetime, he again consulted his said friend who advised him to seek legal advice, which he did and which resulted in the bringing of the present bill; and that the property covered by the deed is the petitioner's entire property except personal effects and household chattels and is of the value of \$151,000.

The allegations made chiefly as to duress and mistake are relied on also in support of the ground of undue influence.

The trust deed recites that the petitioner is desirous of making a "permanent and irrevocable settlement" upon his wife and their children, naming them; that the wife in consideration of such settlement had agreed to release and does release to the trustee all her dower right in the property covered by the deed and for such consideration and other good considerations had released her dower right in the petitioner's homestead property in four deeds from petitioner to his said children whereby said premises are apportioned between the said children subject to certain reservations and conditions. The petitioner then in consideration of \$1 conveys to the trustee certain lands in trust to

collect the rents, etc., and manage the property, or, upon the joint request of the petitioner and his wife or the successor of them during their lives or his or her life and after the decease of the survivor at the discretion of the trustee or trustees for the time being, to sell the property and invest the proceeds, and out of the net income, after payment of the expenses of the trust, to pay the wife \$150 monthly as a first charge and the balance of the net income in quarterly instalments to the petitioner during his life and after his death the entire net income to the said children who shall survive and the children of any child who might die before the petitioner by right of representation, subject to the allowance after the death of the petitioner to the wife if she should survive him, and subject to further monthly charges of \$25 and \$30 respectively to Charles Mahoe and Flora Hiram for life out of the income of certain of the property, and upon the death of the last surviving child of the petitioner and his wife to convey the entire property to the lawful issue of the said children then surviving by right of representation. The trustee is also given power to mortgage the property for the purpose of raising money with which to improve and maintain the estate. It is provided also that the allowance to the wife may be reduced to \$75 a month if at any time she shall accept and the petitioner shall give her support and maintenance. The petitioner also, in consideration of the wife's release of dower and of \$1, releases all his rights in her property. The trustee is further authorized to pay the wife's then outstanding debts to the amount of \$200, out of any property of the petitioner remaining in the hands of the trustee and not covered by the trust deed or if there is no such property then out of the income otherwise payable to the petitioner under the trust deed. Provision is made for the appointment of new trustees from time to time in case of the resignation, removal, death or unfitness of any trustee, such appointment to be made by the husband and wife during their lives, by the survivor during his or her life, and thereafter by the court having cognizance of such matters.

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It is not alleged that the petitioner was aged or weak minded. It is not contended, although some of the allegations and part of the argument seem directed to the point, that the deed is revocable on the ground that it is a voluntary deed, made without consideration, mainly for the petitioner's own purposes and that a clause of revocation was omitted through inadvertence or mistake, nor could such a contention be sustained. *Afong v. Afong*, 5 Haw. 191; *Kellelt v. Sumner*, 15 Haw. 76. Nor in the view that we take of the main questions involved need we consider whether the doctrine of laches, much relied on by the defendants, is applicable. The same may be said of other arguments made by the defendants.

No one of the three grounds of duress, mistake and undue influence is relied upon solely by itself, but they are all relied upon also in conjunction with each other, but that of duress is perhaps the one that is most relied on. As stated in the petitioner's brief, the threat of exposure is the fact upon which the alleged duress hinges. It is not contended that the threat of mere civil proceedings, whether for divorce or separation or guardianship, would constitute duress. The argument, in opposition to the defendants' argument that a threat of civil proceedings does not amount to duress, is that the real distinction is not between civil and criminal proceedings, but whether the threats are in fact of such a nature as to destroy the power of choice; that the reason why it is usually held that threats of civil proceedings are not sufficient is because they as a rule naturally do not produce such fear or dread as to destroy the power of choice, and that the case is different when, added to the threat of civil proceedings, there is a threat of exposure which would result in disgrace, humiliation and shame to the threatened person and others nearly related to him; and that there is a distinction between a mere proposition to make a deed by way of settlement or compromise of a civil claim or contemplated civil proceedings and a declaration of intention to expose made for the very purpose of coercing or forcing the making of the deed. No doubt the doctrine of duress has been extended in recent times

so as to include as constituting duress facts which formerly would not have been considered sufficient. See 9 Cyc. 443 et seq., and cases there cited. And yet no case has been called to our attention which goes so far as to support the contention that a mere statement or threat in contemplated divorce, separation or guardianship proceedings on behalf of a wife against her husband, that the latter's confessed improper relations with another woman would be exposed, amounts to duress. However that may be, it is not clear in the present case that such threat, if the allegations of the bill may be construed as showing that such a threat was made, in fact deprived the petitioner of his power of choice or constrained him to execute the deed. It appears from the bill that the petitioner declined to comply with the attorney's demand, though it was emphatic and accompanied by the threat in question, and stated that he could not agree to anything until he had consulted with his friend and agent Carter and that he executed the deed after asking Carter's advice as to the course that he should follow and being advised by him that the making of the deed would be the best thing he could do, and that, while dreading exposure, he relied on Carter's advice.

The contention as to mistake also is untenable. It is practically that the petitioner did not fully realize the scope or effect of the deed. Some of the allegations of the bill show that the petitioner knew that the deed contained much more than a provision for his wife or provisions for himself, that it contained provisions that would not be effective until after his death. His contention is that he supposed such provisions were in the nature of a testamentary disposition of his property and did not realize that they were irrevocable. It appears also that the deed was read to him from beginning to end, and it is difficult to understand how, even if he had a knowledge of only simple English, he could have supposed the deed to be merely what he now alleges he supposed it to be. It recites that he was desirous of making a permanent and irrevocable settlement and is full of provisions applicable solely to a period subsequent to his

death. However, let it be granted that he did not fully realize its effect. Still, it was his duty to have ascertained its effect, and he cannot complain now that he was mistaken as to that not having taken the necessary steps to inform himself. It is not shown that fraud or deception was practiced upon him or that his mental condition was such that he was incapable of understanding the nature of the deed. It was his duty not only to read it or if he could not read it to have it read to him, but, if he could not understand it because of his imperfect knowledge of the English language or because it was in technical phraseology, to have it translated or explained to him—or take the consequences. See 9 Cyc. 388 et seq., and cases there cited. There was certainly no excuse for his not asking his agent, in whom he had such complete confidence and who read the deed to him, to explain the parts he did not understand. If he chose to trust his agent rather than himself and the agent acted in good faith, he must abide by the result.

The ground that perhaps has most to support it is that of undue influence, and this not because of any allegations tending to show that there was undue influence in fact but because of the legal presumption of undue influence which arises from the confidential relationship between principal and agent in a transaction in which the agent has reaped some advantage at the expense of his principal. It is not shown that the agent acted fraudulently. There would be nothing to sustain this ground if another than the agent had been made trustee under the deed. This ground can be sustained, if at all, under the allegations of the bill, solely upon the fact that the agent was to be trustee under the deed and would presumably be compensated for his services in that capacity. The presumption of undue influence, if any, under the circumstances would be slight, and there are matters shown by the bill which rebut it, if it would exist from the mere fact that the agent was to be the trustee. It does not appear that the suggestion that he should be trustee came from him. The petitioner naturally, in view of his confidence in Carter and the fact that he had already intrusted to

him the management of his entire estate, would want him to be the trustee and, as he states, made the deed knowing that Carter, who had been his agent, was still to be in charge of his property as trustee. Doubtless that went far with the petitioner towards reconciling him to the idea of making the deed. The appointment of the trustee was incidental. The petitioner did not then and has not at any time since objected to Carter as trustee. His complaint now is that the deed was not to his best interests in other respects solely and not at all because of any remuneration that the trustee was to receive. Such remuneration was not specified in the deed. It could be only what the petitioner might assent to or what the law would allow, that is, what the services were reasonably worth. Carter was to continue as trustee with very much the same authority and obligations as he already had as agent, though his tenure would be more secure as trustee than it had been as agent, and yet he could be removed from the trusteeship for incapacity or unfitness or breach of his duties as trustee. On the whole we do not think the allegations of the bill sufficient to support the contention that it was procured by the exercise of undue influence by the agent upon the petitioner. Whether the deed could be set aside as to others interested under it, even if the agent had abused his confidence and obtained an unfair advantage, it is unnecessary to say.

The decree appealed from sustaining the demurrers and dismissing the bill is affirmed.

Smith & Lewis and *L. J. Warren* for the petitioner.

Kinney, McClanhan & Cooper for the trustee.

A. S. Humphreys and *Thompson & Clemons* for the other defendants.

ELLEN ALBERTINA POLYBLANK, OTHERWISE KNOWN AS SISTER ALBERTINA, TRUSTEE FOR STELLA KEOMAILANI COCKETT, AND STELLA K. COCKETT, SOLE BENEFICIARY UNDER SAID TRUST, *v.* DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, AND THE GERMAN SAVINGS AND LOAN SOCIETY, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 4, 1905.

DECIDED OCTOBER 23, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MORTGAGE FORECLOSURE—parties—deficiency judgment.

A suit to foreclose a mortgage may be brought against the mortgagors without joining a subsequent purchaser of a portion of the mortgaged premises, and a deficiency judgment against the mortgagors may be authorized without first foreclosing the interest of the subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a decree of foreclosure and sale under a mortgage from D. Kawananakoa and J. Kalanianaole to Sister Albertina, trustee for Stella K. Cockett. The suit was brought by the mortgagee against the mortgagors and their wives, the German Savings & Loan Society, a junior mortgagee of a portion of the mortgaged premises, and the Territory of Hawaii, and later discontinued as

to the Territory. After the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who, in turn, conveyed it to the Territory. The decree authorized the entry of a deficiency judgment against the mortgagors in case the proceeds from a sale of the mortgaged premises should be found to be insufficient to pay the amount due.

The first claim of appellants is that the decree should be reversed because a purchaser, subsequent to the mortgage, of a portion of the mortgaged premises was not made a party to the suit. It is clear that, unless joined as a party, the rights of a subsequent purchaser cannot be affected or concluded by the decree. The mortgagors have no reason to complain because their interest in the mortgaged premises is foreclosed without joining the subsequent purchaser of a portion. It follows that the foreclosure is good as far as it goes. See *Childs v. Childs*, 10 O. St. 339; *Landon v. Townshend*, 112 N. Y. 93; 2 Jones on Mortgages, Sec. 1395; *Kay v. Whittaker*, 44 N. Y. 565; *Merri-man v. Hyde*, 2 N. W. 218.

It is further claimed that no deficiency judgment should be entered against the mortgagors until all of the mortgaged premises are sold. All that the mortgagors can claim is that the mortgagee should foreclose on and have sold all of the mortgaged property that is possible, that is, that she should foreclose all that the law allows her to foreclose, before entering up a deficiency judgment. In this case all of the mortgaged property is to be sold except that part which is now held by the Territory. The interest of the Territory in that portion cannot be foreclosed and sold without joining the Territory as a party defendant, and that cannot be done. See Chapter 129 of the Revised Laws. The mortgagee has done all that she can, and it would be inequitable that she should suffer through no fault of her own, particularly when the mortgagors have received a substantial benefit by reason of the transfer.

Clark v. Simmons, 8 N. Y. Supp. 74, cited in 2 Jones, Mortgages, Sec. 1709 B, is in point. In that case it was held that

where a mortgage on land partly in New York and partly in another state was foreclosed in New York as to the land therein and that land was sold plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other state as the New York courts could not order a sale of that land. The California cases cited by appellants on this question are not in point, as they are controlled by a statute which has no force in this Territory.

Appellants also claim that the decree, in describing the land to be sold, is erroneous in that it does not follow the description in the mortgage. The circuit judge found, as a matter of fact, against this contention. So far as appears on this appeal we cannot see that the circuit judge erred, and therefore this objection must be overruled.

The decree appealed from is affirmed.

E. A. Douthitt for plaintiffs.

C. W. Ashford for defendants.

JAMES L. HOLT, ASSESSOR AND COLLECTOR OF
TAXES, *v.* WILLIAM SAVIDGE, TRUSTEE OF M.
A. BARETE ESTATE.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED OCTOBER 18, 1905.

DECIDED OCTOBER 23, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PRACTICE—*appeal from District Magistrate on points of law.*

On an appeal on points of law from a judgment of a District Magistrate the judgment stands or falls on the evidence which was before him, there being no suggestion of diminution of the record.
TAXES—*assessment to "estate of M. A. B."*

An assessment of taxes to the "estate of M. A. B." is not authorized by statute.

OPINION OF THE COURT BY HARTWELL, J.

This is an appeal from a judgment for the plaintiff in the sum of \$919.85 and costs in an action "for taxes assessed against the person and property of said defendant on the books of the assessor and collector of taxes for the District of Honolulu, first taxation district, for the years 1901, 1902, 1903 and 1904," the plaintiff asking judgment therefor "with ten per cent. penalty and addition thereto and interest thereon and advertising costs as by law provided and for costs herein incurred." The defendant appealed to this court on the following grounds:

"That the property was assessed to 'Estate M. A. Barete;' that the assessment was illegal on the ground that the taxes were assessed to the Estate, and that it does not show that the property was assessed to any particular party whose duty it was to pay the taxes; and that there was no proper designation of the proper owner or owners of the property."

"That the property was not assessed according to Section 1217 of the Revised Laws or other Laws of the Territory."

"That Maria Barete was the duly appointed Trustee of the Estate at the time the assessments were made, and that the assessments ought to have been made in her name as Trustee of said Estate."

We infer that the paper filed in the case which purports to be a copy of the record of the evidence before the magistrate correctly states the evidence although no certificate that it is a true copy appears. As shown in that paper, the only evidence for the plaintiff was that "In 1901-2-3-4 \$919.85. Returns made for 1901-2-3. No returns made in 1904. Assessment made Estate of M. A. Barete."

It further appears from the same paper "Plff. admits that Wm. Savidge was appointed Trustee August 30, 1905, as appears by Equity Record. Record of appointment of P. D. Kellett, Jr., Dec. 17, 1900, upon the verbal application of Maria Barete, widow of M. A. Barete, Deceased. In Probate at Chambers. Offered in Evidence." The defendant does not appear to have made the defense now presented or to have

obtained any ruling of the magistrate on this matter. At the argument on appeal the plaintiff claimed that the magistrate's record is so meager that reference may now be made to the assessment book which shows that "the property was assessed to P. D. Kellett, Jr., trustee of the Barete Estate or to the Barete estate by P. D. Kellett, Jr., Trustee" and that the statute was thus "fully and fairly complied with."

The defendant correctly insists that the judgment must stand or fall on the evidence which did not include the assessment book but showed that the assessment was made "to the estate." We take the record which is before us, there being no suggestion of its diminution.

An assessment "to the estate of M. A. Barete" is not authorized by statute although we do not sustain the defendant's claim that by Sec. 1217, R. L., the interest of each legatee or heir of the estate must be assessed separately. The defendant is right in his claim that the assessment ought to be made to someone "whose duty it was to pay the taxes." *Wood v. Torrey*, 97 Mass. 34. *Fairfield v. Woodman*, 76 Mo. 549. Whether the trustee was, as claimed by the defendant, illegally appointed, or not, or whether that is material, we need not say.

The judgment appealed from is vacated and the case remanded to the District Magistrate for such further proceedings as may be proper.

M. F. Prosser, Dep. Atty. General, for plaintiff.

W. C. Achi for defendant.

TAKAHASHI v. W. KUALU.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED OCTOBER 23, 1905.

DECIDED OCTOBER 24, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

FINDING OF FACT—held supported by evidence.

A finding of fact by the trial court jury waived that one purporting to execute a lease as agent of another was given authority so to do, is held supported by the evidence.

STATUTE OF FRAUDS—error as to, held not prejudicial.

An erroneous ruling by the trial court that an authority to an agent to make a lease must be in writing in order to be valid even as between the parties to the lease, is held not prejudicial to defendant because, if such error had not been made, judgment would still have to be for the plaintiff and for as large or a larger sum.

OPINION OF THE COURT BY FREAR, C. J.

This is an action for \$2,000 damages for an unlawful eviction. The court, jury waived, found for the plaintiff in the sum of \$50 and costs. The defendant comes here on twenty-three exceptions which it will not be necessary to consider in detail.

The court found that the plaintiff entered and claimed to be in possession under a lease for six years, dated August 1, 1900, and signed "W. Kualu per J. A. Akina;" that on the same date plaintiff paid the rent for three years in advance and took a receipt signed "J. A. Akina for W. Kualu;" that Kualu authorized Akina to make the lease but that as such authority was not in writing the lease was void under the statute of frauds, but that, nevertheless, as a result of the entry and payment of rent

thereunder a tenancy from year to year was created, citing *Couderd v. Cohn*, 7 L. R. A. 69 (118 N. Y. 309); that certain demands for rent made by Kualu were invalid because made at wrong times and for wrong amounts; and that just at dark on April 26, 1904, the defendant caused the plaintiff's household goods and effects to be removed from the house and nailed up the door, that the plaintiff and his wife and children had no place to lodge and that in consequence of the expulsion certain pigs and chickens were lost to the plaintiff.

Defendant's main contention is that there was no evidence to sustain the finding that Kualu authorized Akina to make the lease. The transcript, however, shows that there was such evidence. To refer to only one witness—Heil Kapu testified, among other things, that he went with Kualu on one occasion when he demanded rent of the plaintiff in 1903 or 1904; that Kualu then demanded three years' rent and said the place was rented for six years and that he was demanding rent for the balance of three years; that the plaintiff refused to pay because Akina was the one to collect, whereupon Kualu said that he was just the same as Akina; that the plaintiff produced the lease for six years and the receipt for three years' rent; that Kualu said the receipt was all right and asked for the balance of three years; that the witness asked Kualu if he appointed Akina as his attorney or agent and he replied that he appointed Akina to administer his affairs; that the witness about a month afterwards again asked Kualu if he had appointed Akina as his attorney and that he replied that he had appointed Akina to look after his business as his agent and said that he trusted in Akina because Akina transacted all his business; that when rent was demanded and Kualu said he owned the land, the plaintiff said that might be but that Akina had given the lease and he knew Akina, and that Kualu then said that he only gave him the right to administer his property—only the right to look after his property, to lease and collect; that when witness cautioned Kualu against trusting Akina he replied that he did trust him and had left it all in Akina's hands; that afterwards Kualu told

the witness that he had written to Akina about the lease but hadn't got any answer and wanted to get the power back again and the papers for the land and everything.

It is further contended that the lease is void for want of written authority to the agent to make it, and the trial court so found. Our statute of frauds (R. L. Sec. 1996) does not require such authority to be in writing and we presume that such oral authority would not be void as between the parties under section 2381, which makes powers of attorney for the transfer of real estate void as to third parties unless recorded. The fact that the trial court erroneously found that the lease was void because the authority to make it was not in writing does not require a reversal of the judgment. That was a ruling in the defendant's favor and if it had been the other way the judgment would still have to be for the plaintiff on the theory that the lease was valid and upon the findings that were properly made by the trial judge, and the amount of damages would have been as great and perhaps greater. The defendant cannot and does not complain of that error.

The exceptions are overruled.

No appearance for plaintiff.

J. D. Willard and *A. H. Crook* for defendant.

L. AHOI v. W. AKAU.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

SUBMITTED OCTOBER 23, 1905. DECIDED OCTOBER 24, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

BILL OF EXCEPTIONS—*practice*.

A bill of exceptions ought to state the case and not refer to pleadings and papers on file.

Id.—*general exception*.

A general exception "to the decision upon the law and facts and judgment" of the court cannot be sustained.

OPINION OF THE COURT BY HARTWELL, J.

The defendant's bill of exceptions reads as follows:

"Be it remembered that the motion of the defendant in the above entitled cause, to strike from the files certain instruments, to-wit: instrument from Akioka to Ahoi, (2) instrument from Jesse Makainai to Ahoi, (3) instrument from Makainai to Akau on the grounds that said instruments were not, at that time, duly stamped, was not heeded and considered by the Honorable John Albert Matthewman, Circuit Judge, presiding at the trial of the said cause, and that defendant excepts thereto.

"The defendant excepts to the decision, opinion on law and facts and judgment of said Honorable John Albert Matthewman, Circuit Judge presiding at the trial of said cause, said decision, opinion, law and facts and judgment being filed February 18, 1905, and to which defendant excepted.

"The record, all pleadings, briefs, exhibits, the testimony and the decision, opinion on the law and facts, judgments and all orders, motions and documents now on file in said cause are hereby referred to and made a part of this bill of exceptions."

The exception that the defendant's motion to strike instruments from files because not then stamped "was not heeded and considered" by the judge is overruled. Apparently he did consider and properly denied it.

The general exception "to the decision upon the law and facts and judgment" of the judge is overruled.

Under rule 8 the bill of exceptions ought not to have been allowed. It is not the function of this court to ascertain the nature of a case brought up on exceptions by examining anything but the bill of exceptions and the Territory ought not to be put to the expense of postage stamps in sending to and from superfluous papers. A bill of exceptions ought to state the case and not refer to the pleadings and papers on file for that pur-

pose. There are some twenty papers for instance sent up with this bill which are remanded to the circuit court.

Exceptions overruled.

G. F. Maydwell, for plaintiff.

H. T. Mills, for defendant.

MOSE MEHEULA v. PIONEER MILL COMPANY,
LIMITED.

MOTION.

SUBMITTED OCTOBER 24, 1905. DECIDED OCTOBER 27, 1905.

HARTWELL AND WILDER, JJ., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF FREAR, C.J.

PRACTICE—*final judgment on overruling exceptions.*

The defendant's exceptions at the trial of an action of ejectment in the circuit court, having been overruled, the defendant's motion that this court make a final judgment or order affirming the judgment in the circuit court is denied, there being no statutory authority therefor. The defendant's desire to appeal to the United States Supreme Court from final judgments of this court does not authorize this court to assume the power.

OPINION OF THE COURT BY HARTWELL, J.

The defendant's exceptions taken at the trial in the circuit court of the second circuit in an action of ejectment having been overruled by this court, the defendant first filed a motion for rehearing, which was denied, no member of the court who joined in the opinion requesting the motion to be argued. This was the first instance of the practice under rule 5 concerning rehearing as recently amended so as to conform with the rule of the United States Supreme Court on the subject. The defendant thereupon moved "that a final judgment be entered

herein in this Court affirming the judgment of the Circuit Court of the Second Circuit and remanding said cause to said Circuit Court of the Second Circuit with directions to carry said judgment into execution. And that pending the hearing and determination of this motion and the entry of said judgment, in case said judgment is so entered, that all proceedings for the remitting of the above cause to the Circuit Court of the Second Circuit be stayed."

The motion is based upon Mr. McClanahan's affidavit, "that said defendant feels aggrieved at the decision heretofore rendered by this court in the above cause, and intends to take said cause on appeal to the Supreme Court of the United States; that for this purpose defendant desires the entry of a final judgment by this court and a stay of proceedings in the above cause until said judgment can be rendered and a writ of error duly taken to said judgment; that the value of the property in controversy in the above cause is over the amount of \$5,000.00; that D. H. Case, the attorney of record in said cause, was, at the time of the rendition of the decision herein, on the Island of Maui, and has signified his inability to attend to the motion to be made herein; that affiant's firm was employed to represent said defendant in said matter on this 19th day of October, A. D. 1905; that affiant is informed and believes that a remittitur in the above cause is to be filed on Friday, October 20, 1905, and the papers in said cause transmitted to the Circuit Court of the Second Circuit on said day."

The present attorneys of the defendant in their brief upon this motion say, "It is unquestioned, we take it, that this court had the power to overrule defendant's exceptions and remand the case to the lower court with directions to carry its judgments into execution. If it had the power to do this it also has the power to make an order to that effect in order to have the same fairly upon the record so that an appeal may be taken, whether that order be a 'final judgment' or not. And this is really all defendant wants or asks, and it will be satisfied if the

court denies its motion but does make the 'order' in question (which defendant will move for if necessary). There seems to be a misapprehension of our attitude on the part of the court and perhaps we were at fault in not explaining our position more fully. If this court feels that it has not authority to enter a final 'judgment,' we take it that that feeling can only apply to a judgment which supersedes the original judgment in the Circuit Court. This is not at all what we mean. The order we desire will not in any way supersede the original judgment, but will merely overrule the exceptions in the cause in which it was rendered and leave the said judgment in full force. This position, we contend, is impregnable and the court should, it seems to us, accommodate us at least thus far. We are unquestionably entitled to our appeal under the laws of the United States and this right should be rather facilitated than impeded."

The court is aware of no misconception of the defendant's contention. It cannot be supposed that an affirming judgment supersedes the judgment affirmed. It is when a judgment is disaffirmed, or using the correct phrase, is vacated, that another judgment takes its place.

But a judgment in an action at law is neither affirmed nor disaffirmed by this court in passing upon exceptions other than by vacating a judgment when entered, which, when exceptions are sustained, may be done by this court "without any writ of error in like manner as if it had been entered by mistake." R. L. Sec. 1867. If the exceptions are overruled nothing further is required but to notify the circuit court, in the form of a remittitur. Although judgment in an action at law formally concludes, "wherefore it is considered by the court here that the plaintiff have and recover," or otherwise as the case may be; yet this does not mean that the court makes the judgment which is merely a conclusion of law from a verdict, or in a jury waived case, from the judge's findings. A bill of exceptions, unlike a writ of error or an appeal, does not bring the entire case or its record to this court. We have merely to decide whether the exceptions are good or bad. If they are overruled,

that is the end of the functions of this court relating thereto, nothing remaining but the order, notice, or remittitur, on receipt of which the judgment in the circuit court if it had been entered but suspended pending the exceptions by the provisions of Secs. 1861 and 1865, R. L., remains in full force, requiring no affirmance or other recognition from this court. If no judgment was entered on the verdict it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law and not in consequence of any direction of this court. The records of the case and all papers filed in the circuit court are, it is true, often sent here with the bill of exceptions, as in appeals and writs of error, but the practice is incorrect. When causes are appealed or brought here on error, we have before us the entire record and may "review, reverse, affirm, amend, modify or remand for new hearing in Chambers such decision, judgment or decree in whole or in part and as to all or any of the parties;" in cases of appeal, R. L. Sec. 1860, or in cases of error "the Supreme Court shall have power to enter such judgment in the case as in their opinion the facts and law warrant." *Ib.* Sec. 1883. The defendant contends that under the Revised Laws Section 1630 this court has the power "to make and award all such judgments, decrees, orders and mandates * * * as may be necessary to carry into full effect the powers which are or shall be given to it by the laws or for the promotion of justice in matters pending before it." This court has by law no power in overruling exceptions to make a judgment in the case tried in the circuit court and such judgment is not required "for the promotion of justice in matters pending before it" for nothing is pending. In *Tibbets v. Pali*, 15 Haw. 137, judgment was entered in the circuit court August 29, 1899, and exceptions were overruled June 9, 1903. The plaintiff then brought a writ of error which was quashed because not sued out within six months from the rendition of the judgment, the court citing with approval *Cummins v. Iaukea*, 10 *Ib.* 3, where "judgment on the verdict was entered on

May 25, 1894; exceptions had been overruled and there was nothing left to be done to perfect the judgment." In *Hind v. Wilder S. S. Co.*, 13 *Ib.* 176, an appeal from a decree in admiralty, the court said that under the statute relating to the powers of this court in appeal cases it "has always exercised its discretion as to entering final decrees or remanding cases" referring to the statutes and practice elsewhere by which "appellate courts usually have power either to enter final, complete decrees themselves, or to remand cases to the lower courts." If such discretion were granted by law to this court in overruling exceptions, there would be no occasion for the defendant to "strongly contend that if the exercise of its discretion will prevent harassing and technical objections from being thrown in defendant's way in the exercise of its legal right to appeal, then this court should exercise that discretion so as to facilitate the exercise of that right."

The practice in Massachusetts, as fixed by statute gives the Supreme Court power to enter judgment in cases of exceptions as of appeals, ordering the record to be removed to the Supreme Court. Mass. Pub. St. 832.

The defendant refers to the fishery cases of *Damon* and of *Carter v. Territory*, in which final judgments were entered by this court upon overruling exceptions. 14 Haw. 465. The defendant says, "The Damon case was passed on by the Supreme Court and the Carter case is now pending. A holding that the court was without power to enter those judgments would render them absolutely void and such a result should be avoided if possible." We are not aware that objection was made to the entry of judgment in those cases. If it was done inadvertently or without contest it has not the force of precedent. We are of the opinion that this court can take no other action on overruling the exceptions than to authorize the usual remittitur. The motion is denied.

C. W. Ashford, for plaintiff.

Kinney, McClanahan & Cooper, for defendant.

WILLIAM O. SMITH, TRUSTEE, *v.* THE PACIFIC
HEIGHTS RAILWAY COMPANY, LIMITED, HO-
NOLULU RAPID TRANSIT & LAND COMPANY,
LIMITED, C. G. BALLENTYNE AND C. S. DESKY.

APPEALS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 3, 4, 1905. DECIDED OCTOBER 30, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

JUDICIAL SALES—*setting aside for inadequacy of price.*

A judicial sale may be set aside before confirmation for such gross inadequacy of price as shocks the conscience or raises a presumption of unfairness, but not for mere inadequacy unless accompanied by other circumstances such as fraud, accident, mistake, etc. Whether such a sale should be set aside or confirmed is largely a matter of sound judicial discretion and a decision by the trial judge in a case of this nature should not be reversed unless clearly erroneous.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from an order setting aside a sale and directing a new sale in foreclosure proceedings.

The suit was brought by the trustee for the bondholders of the Pacific Heights Railway Company, most of the stock of which was owned by the defendant Desky. It is claimed that the property cost \$78,000 exclusive of the right of way only four years before. It was bonded for \$50,000. A decree of foreclosure was entered and a sale ordered to be made through a commissioner appointed for the purpose. The property, consisting of lands, right of way, cars, electrical equipment, power house, rails, etc., was sold as a whole for \$1100, excepting a cer-

tain cable which was not sold and a steam condenser which was sold separately for \$100. The commissioner reported with a recommendation that the sale be not confirmed owing to inadequacy of price. The circuit judge, after taking much testimony, confirmed the sale of the steam condenser but disaffirmed the sale of the rest of the property and ordered a new sale. He expressed the opinion that a judicial sale before confirmation, unlike an execution sale which requires no confirmation or a judicial sale after confirmation, could be set aside in the discretion of the court for mere inadequacy of price and, indeed, that it was the duty of the court to order a resale if it appeared that the price obtained was inadequate to such an extent that upon a resale a price could be obtained sufficiently greater to more than cover the expenses of the new sale. He found however that in this case the price bid was grossly inadequate, that an amount vastly in excess of such price, exclusive of the expenses of the new sale, could be obtained upon a resale, and that a greater price could be obtained for the property if sold in parcels than if sold as a whole, and ordered a resale in parcels, from which order the purchaser, the defendant Ballentyne, and the defendant Honolulu Rapid Transit & Land Company, which claims under him, appeal.

The principal question is one of law—as to the rule by which a court should be governed in determining whether a judicial sale should be confirmed or set aside, and more particularly what weight should be given to inadequacy of price when relied on as a ground for setting aside a sale. The appellants contend that a sale, whether judicial or nonjudicial, cannot be set aside, even before confirmation, upon the ground of inadequacy of price, however gross that may be, but that inadequacy if relied on must, in order to justify a resale, be accompanied by other circumstances such as fraud, accident, mistake, etc. The appellees contend that judicial sales before confirmation, unlike such sales after confirmation or nonjudicial sales which do not require confirmation, may be set aside as a matter of sound discretion for mere inadequacy of price, even though the inade-

quacy is not gross and even though it is unaccompanied by such other circumstances. In our opinion each of these is an extreme view. The rule best sustained by both reason and authority, as it seems to us, is that, although mere inadequacy is insufficient unless accompanied by other circumstances, inadequacy so gross as to shock the conscience or imply unfairness in the sale is sufficient for setting aside a judicial sale before confirmation. If the inadequacy is not gross, it should be accompanied by other circumstances, and of course other circumstances alone may be sufficient.

There is, no doubt, as contended by the appellees, a distinction between strictly judicial sales, such as sales in partition, guardianship, administration, receivership, foreclosure, admiralty, etc., proceedings on the one hand, and strictly legal sales, whether founded upon judgments or decrees, as in the case of ordinary executions, or on contract, as in the case of foreclosure under a power of sale, on the other hand. There is perhaps also a third and intermediate class of sales under special statutory provisions in which this distinction is more or less obliterated. Judicial sales are in theory made by the court itself, though acting through an officer appointed for the purpose, who reports his doings to the court, and are not complete until confirmed by the court. Nonjudicial sales are usually made by a public officer acting ministerially under statutory, not judicial, authority or by a person acting under contract authority and are complete as soon as made. They require no confirmation. There are other distinctions between these classes of sales that need not be referred to at this time. It may at first impression seem to follow from the distinction mentioned that the confirmation or setting aside of a judicial sale is a matter purely within the discretion of the court and that such sale might properly be disaffirmed for mere inadequacy of price even though slight,—and discretion almost as wide as that was exercised in early English practice and is exercised still in at least one American state, but, as a result of the pernicious consequences of that practice shown by experience, that is not the rule now either in England,

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where it was long ago disapproved judicially and has since been changed by statute, or generally in the United States, where it has been changed by judicial decisions. This change by judicial decisions in America has not, however, gone generally to the extent contended for by the appellants of requiring that inadequacy even though so gross as to shock the conscience should be accompanied by other circumstances in order to justify setting aside a judicial sale before confirmation, though it cannot be denied that the change has gone to that extent in some states.

The law upon this subject has been presented by counsel at great length but it will not be of any advantage to review the numerous cases cited. Counsel on each side endeavor to show that the decisions relied upon by counsel on the other side are some of them inapplicable and others erroneous. They also quote different passages from the same authors in support of their respective positions. The inadvisability of discussing extensively the cases and text books cited may be shown by a single illustration, which will at the same time throw some light upon the state of the law upon this subject. In *Graffam v. Burgess*, 117 U. S. 180, the Supreme Court of the United States, referring to strictly judicial sales before confirmation, after stating the early English rule that biddings would be opened upon a mere offer to advance the price ten per centum and Lord Eldon's expressed dissatisfaction with that practice and the change of the rule in England by statute, said: "In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal, that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed," and, after citing in support of that statement a list of cases covering half a page, added: "From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy,

the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold." The appellants contend that the conclusion thus announced is too liberal and in opposition to it cite Freeman (2 Exec. 3d Ed. Sec. 304i) who, after quoting it, states that there is no dissent from that part of it which makes great inadequacy of price accompanied by other circumstances sufficient, but in regard to the conclusion that inadequacy alone, though so gross as to shock the conscience, is sufficient, says: "We think the decided weight of authority in the United States does not sustain this conclusion, and that, on the contrary, it asserts that, where there is no irregularity or unfairness, or, in other words, nothing but inadequacy, urged as a ground for refusing confirmation, it must fall, though the inadequacy be very clearly established and be so great that it may well be characterized as gross." The cases cited by the author do not bear him out. The appellees, on the other hand, contend that the conclusion in the *Graffam* case is too narrow and cite *Trust Co. v. Street Ry. Co.*, 96 Ia. 646, in which the supreme court of Iowa rejected that conclusion on the ground that it was a mere dictum inasmuch as the sale in that (the *Graffam*) case was an execution and not a judicial sale, and held that mere inadequacy, though not so great as to shock the conscience, was sufficient for setting aside a judicial sale, and in support of that view quoted from section 311 of Freeman, where, after pointing out the "vast difference between execution sales and those made under decrees of chancery or probate courts in respect to the rights of the purchaser and the power of the courts," the author says that in sales "made under decrees, and which may, therefore, properly be called 'judicial sales,' when the proceedings are reported to the court, a purchaser is simply a preferred bidder. The court is not bound to accept the bid, and may, in its discretion, refuse to confirm the sale for many reasons which would have no application where

the purchase was made under execution." The appellants in reply cite another portion of section 304i of Freeman in which the author, after stating that some American courts follow the early English rule and others follow the rule that gross inadequacy alone is sufficient, says: "From this statement we except the decisions of the Supreme Court of Iowa. It maintains that, in the case of a judicial sale, when no right of redemption exists, the sale must be approved by the court, and that such approval may properly be withheld solely on the ground of inadequacy of price," apparently meaning that the Iowa court stands alone in holding that inadequacy though not gross is sufficient.

We will quote from several text books relied on in part by counsel on each side, and refer to several decisions in the federal courts. In addition to the quotations already made from Freeman, the following is from section 304d: "It is, perhaps, not correct to say that any of our courts have either absolutely adopted or absolutely rejected the English rule respecting the opening of the biddings on an offer of an increased bid. Whether they shall be opened is a question addressed to the sound discretion of the court making the sale, to be determined from all the circumstances, and such determination will rarely be reviewed upon appeal." Rorer (Judicial Sales, Sec. 28) says: "The view that confirmation may not be refused for mere inadequacy of price is clearly against the current of authorities in regard to judicial sales, and as a doctrine, is applicable only to execution sales at law, which will not be set aside for mere inadequacy of price," and (Sec. 106), "the chancellor has a broad discretion in the approval or disapproval of such sales," and (Sec. 549) "if there be no fact or circumstance relied on to set a sale aside but inadequacy of price, then the inadequacy must be such as in itself to raise the presumption of fraud, or else the sale will not be disturbed. But if in addition to such inadequacy there be any appearance of unfairness, or any circumstance, accident, or occurrence in relation to the sale of a character tending to cause such inadequacy, then the sale will be set aside; but inadequacy of price is still the main ground

of disturbing the sale, for if the price were full value, or even a passable one, then the objectionable facts or circumstances could have worked no evil." In 17 Am. & Eng. Enc. of L., 2d Ed., 1000-1002, the rule is stated thus: "It is well established that, as a general rule, a judicial sale will not be set aside on account of mere inadequacy in the price realized thereat. But, on the other hand, it is well recognized that a sale may be set aside where the inadequacy is so gross as to shock the conscience, or raise a presumption of fraud, or unfairness, or mistake." Jones (2 Mortgages, 6th Ed. Sec. 1638) says: "It rests wholly in the discretion of the court whether the sale shall be confirmed or not, and this power will be exercised prudently and fairly in the interests of all concerned," and (Sec. 1641) "the inadequacy of price may be such as to be of itself an indication of fraud or unfairness; but if not so gross as to indicate fraud, when taken in connection with other circumstances, it is ground for setting the sale aside and ordering a resale." Wiltsie (Mortgage Foreclosures, Sec. 536) says: "A sale may be set aside, especially before confirmation, for fraud, unfairness or irregularity or for want of notice, but it seems not for mere inadequacy of price, unless it results in a clear sacrifice," and (Sec. 539) "mere inadequacy of the price brought by the mortgaged premises on a foreclosure sale is not a sufficient ground for ordering a resale of the premises, unless the inadequacy is so great as to be evidence of unfairness or fraud." Many cases are cited in these works in support of the various statements made.

Referring to the cases in the federal courts,—it is true that the *Graffam* case above mentioned was an independent suit in equity to set aside an execution sale, but the remarks of the court above quoted were made with reference to setting aside or confirming judicial sales proper. The court was not misled into applying to judicial sales the rule applicable to execution sales. On the contrary it tended rather to apply even to execution sales the rule applicable to judicial sales. The conclusions of the court in regard to judicial sales were evidently

drawn after careful investigation and consideration and, considering the high authority of the court, are entitled to great weight. They were approved in *Pewabic Mining Co. v. Mason*, 145 U. S. 367, an appeal from the confirmation of a judicial sale, and in *Schroeder v. Young*, 161 U. S. 334, a suit to set aside an execution sale. The same view is taken by other federal courts. The circuit court of appeals in *Magann v. Segal*, 92 Fed. 252, gives one of the most satisfactory reviews of the law, both English and American, upon this subject and refers not only to cases in the federal supreme court but to a number of cases in the federal circuit courts. The court, among other things, quotes from an earlier federal decision as follows: "Until the practice is in some way satisfactorily regulated, the best solution of the subject seems to be to hold closely to the public policy which protects the sales against instability by refusing to set them aside, unless the price offered in advance is so great, in proportion to the bid already made, that it affords substantial evidence that for some perhaps unknown reason, the property has been greatly undersold,—so much so that the purchaser has not merely a bargain, with a fair margin for profit, but an unconscionable advantage of the parties for whose benefit the sale has been made." The court also says: "Upon the weight of American authority, we conclude that mere inadequacy of price, unless so great as to shock the conscience, will not justify the reopening of biddings. * * * On the other hand it is not expedient that the court shall lose all control over such sales. * * * A price so inadequate as to shock the conscience, or mere inadequacy, coupled with misconduct upon the part of those conducting the sale, or fraud, or conduct bordering upon fraud upon the part of the purchaser under the practice of both English and American courts, has always been regarded as furnishing good cause for reopening the biddings." See also *Fed. Ins. & S. D. Co. v. Roanoke St. R. Co.*, 98 Id. 475, and *Files v. Brown*, 124 Id. 133. The federal decisions all seem to be to the effect that gross inadequacy such as shocks the conscience

or implies unfairness in the sale is sufficient to justify setting it aside. This view seems to receive most support from the state courts also.

This is the view that was taken in *Smith v. S. S. City of Columbia*, 11 Haw. 709, in which this court says: "There is but little doubt that the general rule governing the confirmation of a judicial sale is that the sale, if regular, will be confirmed unless the price obtained is so grossly inadequate to the value of the property sold as to shock the conscience of the court and be presumptive evidence of fraud. We find that there was no irregularity in the sale and the only ground upon which the sale is attacked is that of gross inadequacy," and, after reviewing the evidence, "We feel obliged, in view of the evidence adduced, to hold that the value that the vessel would produce to the purchaser is not so grossly inadequate as to authorize a resale." In view of what has been said it is evident that appellees' contention that the court in the case just referred to was misled through inadvertance or otherwise into applying to a judicial sale a rule applicable only to execution sales, is without foundation and, on the other hand, that appellants' contention that the court was of the opinion that there must be not only such gross inadequacy as to shock the conscience, but also other evidence of fraud, is equally untenable. It is true the court used the expressions "shock the conscience" and "be presumptive evidence of fraud" in the conjunctive, although similar expressions when coupled in other cases and in the text books are generally stated in the disjunctive, and yet it is clear that the court did not intend these as being two different or unconnected things which must unite in order to warrant setting aside a sale. Not only is the word "fraud" used in expressions of this kind in a general sense as including surprise, accident, mistake, irregularity, etc., as well as fraud, misrepresentation, misconduct, etc., but it is the grossness of the inadequacy which implies the fraud or unfairness, and it is sufficient if the inadequacy is so great as to imply that, even though it does not suggest the nature of the fraud and there is nothing else to

show in what it consisted. As stated in one of the quotations above made, it is sufficient if the grossness of the inadequacy is such as to afford substantial evidence that for some perhaps unknown reason the property has been greatly undersold.

No inflexible rule can be laid down for all cases. More would be required for setting aside an execution sale or a judicial sale after confirmation than a judicial sale before confirmation. More might also be required for setting aside certain classes of judicial sales before confirmation, as, for instance, when such sales must be made of necessity or of right and the main object is to obtain the proceeds for the purpose of paying a debt on foreclosure of mortgage or otherwise, than for setting aside other judicial sales before confirmation, as, for instance, when the main object is not to obtain the money for the purpose of paying an obligation but to sell the property for some purpose, as, for instance, to realize on it before it depreciates in value or for the purpose of acquiring means for improving an estate or making a better investment. The main idea is on the one hand to maintain the stability of judicial sales and not deter bidders by rendering such sales liable to be set aside for trivial reasons and on the other hand to protect interested parties and not unduly sacrifice their property.

In the present case the appellees contend that there are other circumstances which would justify setting aside the sale in conjunction with the inadequacy of the price even if gross inadequacy alone were not enough or if it were found that there was not gross inadequacy in this case. For instance, it is claimed that the defendant Desky who, next to the bondholders, was most interested in the property, was excusably misled into supposing that the sale was to occur at a different time or place and so was unable to be present. Another circumstance claimed is that although the decree directed the commissioner to "sell all and singular the property * * * or so much thereof as shall be necessary," which, it is contended, meant a sale in parcels, the trustee and the bondholders, intending to bid it in themselves, agreed that it should be sold as a whole, and that the fact

that it was generally known that the bondholders intended to bid led some who might otherwise attend and bid to remain away from the sale and others to attend unprepared to bid, and that the bondholders changed their minds at the last moment and refrained from bidding. How far these alleged circumstances are sustained by the evidence or whether, if sustained, they would be sufficient in addition to inadequacy, if anything in addition were needed, for setting aside the sale, we need not say. In *Schroeder v. Young*, 161 U. S. 337, the court states that where there is inadequacy of price courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as, for example, if the sale has been attended by any irregularity or if several lots have been sold in bulk when they should have been sold separately or sold in such manner that their full value could not be realized, or if bidders have been kept away, etc., and similar views have been expressed by other courts. In this case the circuit judge found not only that the price bid was grossly inadequate and that an amount vastly in excess of that could be obtained on a resale, but that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the highest price bid and that a higher price could be obtained for the property if sold in parcels than as a whole. It is evident that the property could not be sold as a whole as a going concern; it could be sold only as a wreckage proposition whether sold as a whole or in parcels. Some courts and text writers take the view that matters of this sort are so much within the discretion of the trial judge that they are not appealable, but the better opinion, as it seems to us, elsewhere and the one that is in conformity with our own practice, is that orders confirming or setting aside judicial sales are reviewable but that they should not be reversed except where they are clearly erroneous. Considerable weight should be given to the opinion of the trial judge in a matter of this kind. Under the circumstances we are of the opinion that the order appealed from should not be reversed and accordingly it is affirmed.

Castle & Withington for H. R. T. & L. Co. and C. G. Ballentyne, appellants.

Smith & Lewis and *L. J. Warren* for the trustee, appellee.

Thayer & Hemenway for Pac. Heights Ry. Co. and C. S. Desky, appellees.

F. E. THOMPSON v. WHITNEY & MARSH, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 6, 1905.

DECIDED OCTOBER 30, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PLEADINGS, CONSTRUCTION OF—*corporation indorsing note for accommodation of maker—holder for value or without notice—inference from taking after maturity and dishonor a note so indorsed.*

In an action against the indorser by the holder of a note signed "Honolulu & Hawaiian Paper Co., Ltd., by Walter Gasset, Manager" and indorsed "Whitney & Marsh, Ltd., by H. T. Marsh, Secretary, H. T. Marsh, Fitzgerald Trunk Co., H. F. Fitzgerald," the complaint averred in substance that the note was made and delivered to pay for certain goods on the credit of the indorsement; that the defendant indorsed the note for the purpose of procuring for the maker a credit with the drawee; that the maker of the note in consideration of the indorsement agreed to deliver to the defendant the said goods purchased by the maker from the drawee, and that at the date the note was delivered to the drawee the maker was insolvent and unable to obtain goods on credit, of all of which the defendant had knowledge; that after the note had matured and been dishonored the drawee indorsed and delivered it still unpaid to the plaintiff. Held, it is to be inferred that the plaintiff, having been permitted to amend his original complaint in order to show that the indorsement was not made for accommodation, has stated the facts as favorably to himself as the case permitted; that he has pleaded facts sufficient to show that the indorsement was made for accommodation but failed to aver facts show-

ing that this was done in connection with the defendant's business or required by the exigencies of that business. Therefore the amended complaint shows an indorsement given for the accommodation of the maker of the note.

The plaintiff having taken the note after maturity and after it was dishonored is, in the absence of averment to the contrary, presumed to have taken it with notice that the indorsement was not in the usual course of business and was for the accommodation of the maker. The plaintiff therefore is in no better position than the drawee and the same defense which the defendant corporation could make to an action by the drawee can be made in this action. The facts that the indorsed note was given in payment of goods which the insolvent buyer could not obtain on its own credit and that the defendant indorsed the note for the purpose of procuring for the buyer credit with the seller, preclude an inference that the indorsement was made by the defendant in its ordinary course of business.

CORPORATION—authority to issue accommodation paper—consideration for indorsement moving from maker of note—transaction outside of scope of corporate business—defense of illegality.

An indorsement by a corporation may or may not be valid according to whether it appears that the collateral transaction involved in the maker's promise of benefit to the indorser is within the scope of the indorser's corporate powers. Consent of all the stockholders cannot add to powers of a corporation given or authorized by statute. A corporation cannot indorse for accommodation of another paper in which it is not interested. A corporation may set up the defense of illegality of its indorsement in an action on its ultra vires indorsement brought by one who is not a bona fide holder for value without notice.

OPINION OF THE COURT BY HARTWELL, J.

The action was brought upon the defendant's indorsement of two promissory notes of the Honolulu and Hawaiian Paper Co., Limited, payable in the sums of \$500 and \$1,000 respectively to the order of Fitzgerald Trunk Co. The defendant's demurrer that the complaint does not show a cause of action, is based on its claim that the complaint shows it indorsed the notes for the accommodation of the maker which, it is contended by the

defendant, was beyond its corporate powers. The demurrer, having been overruled, the case comes upon the defendant's interlocutory bill of exceptions.

The complaint avers that on July 19, 1902, "the Honolulu and Hawaiian Paper Company, Limited, a corporation, then and at all times hereinafter mentioned, organized and existing under and by virtue of the laws of the Territory of Hawaii, made, executed and delivered to the Fitzgerald Trunk Company, its certain promissory note in writing in words and figures as follows, to-wit:

\$500.

Honolulu, H. I., July 19, 1902.

Three months after date we promise to pay to the order of Fitzgerald Trunk Co., Five Hundred Dollars at the National Bank of North America, Chicago. Value received with interest at 6% per annum after due, until paid.

Sig. HONOLULU & HAWAIIAN PAPER CO., LTD.

By WALTER GASSETT, Manager.

(Indorsed)

Whitney & Marsh, Ltd.

By H. T. Marsh, Secretary.

H. T. Marsh

Fitzgerald Trunk Co.

H. F. Fitzgerald.

"That at said time and before said note was delivered as aforesaid, the defendant, Whitney & Marsh, Limited, indorsed said note.

"That said note was made and delivered as aforesaid for the purpose of paying for certain goods, wares and merchandise on the credit of such indorsement; that defendant, Whitney & Marsh, Limited, indorsed the same for the purpose of procuring for the said Honolulu and Hawaiian Paper Company, Limited, a credit with said Fitzgerald Trunk Company; that said Honolulu and Hawaiian Paper Company, Limited, in consideration of such indorsement so made as aforesaid undertook and agreed to deliver and did deliver to said Whitney & Marsh, Limited, those certain goods, wares and merchandise aforesaid purchased by said Honolulu and Hawaiian Paper Company, Limited, from

said Fitzgerald Trunk Company of the value of \$500.00, and that at the date said note was delivered by said Honolulu & Hawaiian Paper Company, Limited, to said Fitzgerald Trunk Company said Honolulu & Hawaiian Paper Company, Limited, was insolvent and unable to obtain goods, wares and merchandise on credit, of all of which said Whitney & Marsh, Limited, had knowledge.

"That said note was duly presented for payment at the time and at the place of payment therein named, and was dishonored, and was thereupon duly protested for non-payment, of all of which due notice was given to the defendant; that the costs of said protest were Two and 58-100 Dollars.

"That thereafter said Fitzgerald Trunk Company by H. J. Fitzgerald, indorsed and delivered said note, still being unpaid to plaintiff herein and said plaintiff is now the owner and holder thereof.

"That although frequent demand for the payment of said note and interest thereon has been made by plaintiff of defendant said defendant has neglected and refused and still neglects and refuses to pay the same or any part thereof, and the same is due and wholly unpaid."

The complaint contains a second count on the indorsement of the \$1,000.00 note, with like averments.

The complaint also avers "That defendant is now and at all times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, and having its place of business at Honolulu, aforesaid."

The case is now presented upon an amended complaint, a demurrer to the original complaint having been sustained by the circuit court without leave to amend and this court on exceptions having remanded the case with leave for the plaintiff to amend in order that he might, if the facts permitted, show that this was not a case of an accommodation indorsement.

The following are the amendment, viz: The original complaint averred that the note was "made and *indorsed*," the amended complaint avers that it was "made and *delivered* for the purpose of paying for certain goods," etc. The amended

complaint, after the averment that the defendant indorsed the note for the purpose of procuring for its maker a credit with the drawee, omits the words in the original complaint, "knowing that it would be so applied, and knowing that the said note was so passed and so indorsed by said defendant with the privity of said Honolulu and Hawaiian Paper Company, Limited, to the said Fitzgerald Trunk Company in payment as aforesaid." In place of the omitted averment the amended complaint adds the averment above recited that in consideration of the defendant's indorsement made as aforesaid the maker of the note agreed to deliver and did deliver to the defendant the goods purchased by the Paper Company which was then insolvent and unable to obtain goods on credit, of all of which the defendant had knowledge.

The case which was first presented showed, as we thought, that the indorsement of the defendant corporation was made for the accommodation of the maker of the note. Assuming but not deciding that the indorsement would be unauthorized by law, we allowed the plaintiff an opportunity by amending his complaint to show that the indorsement was required by the exigencies of the defendant's business, thereby bringing the case within the implied power of a corporation to issue negotiable paper, which is recognized by the statutory prohibition of the exercise of such power by a corporation "except so far as the exigencies of the particular business for which it was incorporated shall require" (Sec. 2560 R. L.) implying that negotiable paper may be issued in the excepted cases.

But the amended complaint does not show that the defendant's indorsement was made in, or required by the exigencies of its particular business.

The maker of the note, being unable, upon its own credit, to obtain the goods bought of the drawee unless the defendant would indorse its note, secured the indorsement by agreeing to deliver the goods, when obtained, to the defendant. The use of the goods, which the agreement permitted the defendant to make, is left for inference. The plaintiff claims that no infer-

ence can be made of the defendant's unlawful use or of its use of the goods other than its corporate business required or justified. This argument is based on the general presumption of right conduct, which applies to corporations as well as persons, and on the general rule that wrong conduct or unauthorized acts are not presumed but must be shown. This contention of the plaintiff would have to be sustained if he had contented himself with a common law declaration upon an indorsement; but he has not seen fit to declare as at common law, he has pleaded facts sufficient to show that the indorsement was made for accommodation, but has failed to aver facts showing that this was done in connection with the defendant's business or required by the exigencies of that business. "The reason why at common law a pleading is construed against the pleader is that it is a natural presumption that the party pleading will state his case as favorably as he can for himself." *U. S. v. Linn*, 42 U. S. 111.

Accommodation paper is frequently defined as that which is given without consideration. The plaintiff, apparently relying upon this definition, has stated a consideration for the indorsement and claims that he has thus brought a case which is not subject to the law of corporations concerning accommodation indorsements. But an indorsement for accommodation is not often made gratuitously; on the contrary it is usually in consideration of benefits expressly or impliedly promised rather than as a favor to the maker of the note.

If the indorser receive a consideration directly from the drawee, the indorsement is not given for accommodation; but if induced by the maker's promise of benefit to himself, apart from the consideration moving to him from the drawee, the indorsement, if made by a corporation, may or may not be regarded as given for accommodation, according as it may appear that the collateral transaction is within the scope of the indorser's corporate powers.

Thus in *Nat. Bk. v. Co.*, 116 N. Y. 293, S. T. & Co., makers of notes payable to their own order and indorsed by them in blank, obtained the indorsement of the defendant corporation

for a sum of money paid by them to its president, "being at the rate of one-fourth of one per cent. a month for every month of the time the notes run." The court held that the indorsement was ultra vires and void, saying "Counsel have not directed our attention to, nor have we found in any of the statutes referred to, a provision empowering the defendant to bind itself by making or indorsing promissory notes for the accommodation of the makers for a consideration paid."

In *Lyon, Potter & Co. v. First Nat. Bk.*, 85 Fed. 122, the plaintiff, in error, a corporation, had indorsed in blank a promissory note of \$5,000.00 made by C. H. Martin Co., a corporation, payable to the order of C. H. Martin, which the defendant had discounted at the request of Martin. To an action upon this indorsement, the defense was made that it was for the accommodation of C. H. Martin and without consideration, and that it was beyond the powers of the corporation. The facts were in evidence that the Martin Co. was a corporation selling musical instruments with a capital stock of \$10,000.00 of which Lyon held \$5,000.00, Potter \$500.00 and Martin \$4,500.00, Martin being its president and Potter its secretary and treasurer, as well as treasurer of Lyon, Potter & Co. Martin having informed Potter that \$5,000.00 was required to pay the liabilities of the Martin Co., of which \$1,500.00 was due upon a note of that company indorsed by Lyon, Potter & Co., and \$2,000.00 was owing to Lyon, Potter & Co., on current account with the Martin Co., Martin, out of the proceeds of the note indorsed as aforesaid, paid the \$1,500.00 note and the \$2,000.00 owing on account.

The court held that the indorsement being partly for the benefit of the corporation, which made the indorsement, was not to be treated as made for accommodation. And so when a corporation buys goods by indorsing a note. *Bank v. Allen*, 90 Fed. 545.

It is not essential that the benefit which the indorsing corporation receives from indorsing a note shall come directly from the drawee. It is enough if the benefit is received indi-

rectly, provided always that the indorser's object in making the indorsement is a legitimate object in connection with its regular corporate business. Of course the maker's object in securing the aid of an indorsement may be something in which the indorser is not legitimately concerned; but while the indorser's intent necessarily is to aid the maker of the note by lending him its credit, if it seeks to accomplish thereby legitimate objects of its own, and not simply to aid the maker, then the indorsement is not for accommodation.

The complaint shows, as we think, an indorsement given for the accommodation of the maker of the note. It is not averred or claimed in argument that the plaintiff took the note for value or without notice but merely that the drawee, after demand and refusal, indorsed and delivered it to the plaintiff, presumably for collection.

And even if the plaintiff had bought or cashed the note, "the fact that the maker of a promissory note procures it to be discounted for his own benefit is, if unexplained, notice to the discounteer that the indorsement is not in the usual course of business, but it is for the accommodation of the maker." *Nat. Park Bk. v. Co., ubi supra.*

The plaintiff therefore is in no better position than the drawee and the same defense which the defendant corporation, as an indorser for accommodation could make to an action by the drawee can be made in this action by the plaintiff who took the note with notice that this was an accommodation indorsement, and knowing, as the complaint avers, that the indorsed note was given in payment of goods which the insolvent buyer, the maker of the note, could not obtain on its own credit, and that the defendant indorsed the note for the purpose of procuring for the buyer credit with the drawee, the seller of the goods. These facts preclude an inference that the plaintiff or the drawee might have regarded the indorsement as made by the defendant in its ordinary course of business.

It is familiar law that while a partner cannot bind his firm by an accommodation note or indorsement, the firm may be

bound by actual or implied consent, or by subsequent ratification. The same rule applies to partnership notes given by a partner for his individual debt.

It is generally held, however, that a corporation cannot use its corporate funds for such purposes unless authorized to do so by statute conferring the power expressly or by necessary implication.

"It is well settled that a corporation has no implied power to issue or indorse bills or notes in which it has no interest for the mere accommodation of another, for such a transaction is ordinarily foreign to the objects for which corporations are created; and it can make no difference that the corporation will be incidentally benefited by such a transaction, or is paid a consideration, or that the transaction is consented to or ratified by all the stockholders." 1 Cl. & Marsh, Priv. Corp. Sec. 182. "There is a dictum by Judge Brown to the contrary in the late New York case, *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y., 165, but it is merely dictum, with no citation of authority to support it, and it is directly contrary to the settled rule in other jurisdictions, and to the rule clearly established by the actual decisions in New York." *Ib.* p. 144.

"A corporation has no power to make or indorse commercial paper for the accommodation of others unless the power is expressly conferred by its charter or governing statute." 7 Thomp. Corp. Sec. 8341.

A corporation cannot issue or indorse simple accommodation paper in which it has no interest. Such paper will be void in the hands of parties who have notice of its character." Green's Brice's *Ultra Vires*, 252 n. (a).

"A private manufacturing corporation has no power to accept drafts having no connection with its business, being merely loans by way of accommodation. It cannot acquire this power simply by exercising it repeatedly. The directors and stockholders cannot, either by permission or ratification, confer it upon any of its officers or agents. If the holder of such acceptance takes it with knowledge of its character he cannot enforce it. He has notice of its invalidity. The corporation may interpose that defense." *Webster & Co. v. Howe Machine Co.*, 54 Conn. 411.

"We know of no well considered case where a corporation,

which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so." *Penn. Co. v. St. Louis, Alton, &c., Railroad*, 118 U. S. 317.

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." *McCormick v. Market Bank*, 165 U. S. 549.

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an ultra vires act." *California Bank v. Kennedy*, 167 U. S. 367.

"The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, cannot be enforced, or rendered enforceable, by the application of the principle of estoppel. The rule in Kansas seems to be that when the contract has been executed and the corporation has received the benefits of it, the corporation is estopped from questioning its validity, and so in respect of evidences of indebtedness purchased before maturity in good faith and without notice. But we are not persuaded that if the defence of ultra vires had been interposed in the action against this company, and the facts had been found to be as they have been found here, the defence would not have been sustained in the courts of Kansas." *Ward v. Joslin*, 186 U. S., 151.

"The constitution of a corporation, and consequently the corporate powers, are presumed to be known as matters of law to all persons interested in the corporate enterprise or dealing with the corporation. Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity. And all persons dealing with a corporation are bound to take notice of its charter, constitution, by-laws and manner of doing business." 1 Beach Priv. Corp. Sec. 383.

"A corporation cannot by its officers execute a note for a debt due from a third person to another, having no relation to its business. A manufacturing corporation, organized under the general laws of New York, has no power to indorse for the accommodation of another paper in which it is not interested. And the indorsement of such paper by the treasurer of a manufacturing corporation may be presumed to be *ultra vires*." 1 Reid Corp. Finance, Sec. 68.

Hawaiian corporations are not authorized by the statutes under which they are created to issue accommodation paper. The statute (R. L. Sec. 2560) that "except as otherwise provided no corporation shall be deemed to possess the power of discounting bills * * or issuing notes or other evidences of debt except so far as the exigencies of the particular business for which it was incorporated shall require," implies that it may issue negotiable paper if the exigencies require, but it cannot be deemed that they require the corporation to aid insolvent traders with its credit or money. The statute also implies that corporate notes shall be issued only to meet the exigencies of the corporate business and that if issued for other purposes they have no validity except with bona fide holder for value without notice that they were issued for an unauthorized purpose.

To issue accommodation paper is not necessary for carrying on any business for which corporations or joint-stock companies may be incorporated under the laws of Hawaii. The consent of all the stockholders cannot add to powers of a corporation which are given or authorized by the statute under which it has corporate existence. Issuing negotiable corporation paper for value received, being lawful, an innocent holder of such paper may rely upon the presumption that it was given in the regular course of corporate business, as against such person, a corporation could not escape liability by showing that the paper was not so given. But the presumption of legality cannot be made in favor of one who knows otherwise; as to him the corporation may set up illegality in defense of an action on its *ultra vires* notes or indorsements.

The objection to corporations issuing accommodation paper

is sometimes based on the absence of corporate power to give away corporate funds gratuitously. "The property and funds of a corporation belong to its shareholders, and cannot be devoted to any use which is not in accordance with their chartered purposes, except by unanimous consent. No agent of a corporation has implied authority to give away any portion of the corporate property, or to create a corporate obligation gratuitously. It follows, for the same reason, that authority can never be implied to lend the credit of a corporation without a consideration, or to sign its name to negotiable paper for the accommodation of others." 1 Morawetz Priv. Corp., Sec. 424. We think that the objection to corporation paper, made for the purpose of assisting others, must be based upon the non-existence of corporate power to engage in any transactions outside of its chartered purposes. Thus, "It is well settled that a corporation cannot engage in a business wholly distinct from its main enterprise, merely in order to raise funds for the purpose of carrying on the latter; nor is a transaction authorized merely because it is profitable to the corporation." *Ib.* Sec. 393.

"The fact that a transaction is profitable to a corporation is not alone sufficient to show that it is within its chartered powers. The ultimate object of every business corporation is the gain of money, but this object must be attained by the particular means indicated by the company's charter. To employ other means would be contrary to the agreement of the shareholders, and in excess of the authority granted by the State." *Ib.* Sec. 363.

It may be for the interest of a corporation to aid by its credit or its money those whose business is allied to or is of a like nature with its own, and the failure of which might affect injuriously its own business; and yet to make common cause with such other persons or corporations on the claim that the exigencies of its own particular business require it to do so, would perhaps be beyond its corporate power. Whatever may be the favorable result upon the corporation of giving voluntary aid under such circumstances, the granting or withholding of such aid would involve the exercise of large discretion, so

liable to abuse or favoritism that it cannot be classed with any corporate power granted by statute. If such power were expressly included in articles of association of incorporated joint stock companies, few persons would care to risk their money in purchase of its stock unless sure of the action of those who held the majority of the stock. It is for the protection of the minority stockholders, as well as in pursuance of the general policy of law concerning corporate powers, that corporate transactions are restricted by law to the purposes which are defined in the corporate charter of articles of association.

Exceptions sustained, order to vacate judgment with further appropriate proceedings.

Thompson & Clemons for plaintiff.

Thayer & Hemenway for defendant.

W. W. CHAMBERLAIN v. MARIA J. BUSH AND JOHN
E. BUSH.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 23, 1905. DECIDED OCTOBER 30, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MORTGAGE FORECLOSURE—*name of mortgagee.*

Where the name of the mortgagee in a note and mortgage was through a mistake erroneously described as the Hawaiian Evangelical Association instead of the Board of the Hawaiian Evangelical Association, a corporation, the party intended and for whose benefit the note and mortgage were executed and delivered, and there was in existence a voluntary unincorporated association known as the Hawaiian Evangelical Association, a bill to foreclose said mortgage may be brought by the assignee of the Board of the Hawaiian Evangelical Association, a corporation, without first

reforming the note and mortgage and without joining the voluntary unincorporated association as a party.

Id.—*variance between mortgage and decree in description of the premises.*

An objection that there was a variance between the description of the premises in the mortgage and the decree is not considered in the absence of a transcript showing the testimony on that point.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by defendants from a decree of foreclosure and sale. The suit was brought by W. W. Chamberlain, the assignee of the mortgagee, against Maria J. Bush and J. E. Bush, the mortgagors. It is alleged in the bill, denied in the answer of defendants, and found by the circuit judge, that on May 3, 1899, the mortgagors borrowed \$5,500.00 from the Board of the Hawaiian Evangelical Association, a corporation, and gave to said corporation their promissory note for said sum secured by mortgage on certain real estate, and that the name of the mortgagee was, through a mistake, erroneously inserted in the mortgage as the Hawaiian Evangelical Association, a Hawaiian corporation, and in the note as the Hawaiian Evangelical Association, instead of the Board of the Hawaiian Evangelical Association, a corporation, the party intended and for whose benefit the note and mortgage were executed and delivered. The circuit judge also found that at the date of the execution of the note and mortgage there was a voluntary and unincorporated association of persons known as the Hawaiian Evangelical Association of which one W. W. Hall was the treasurer, and that said W. W. Hall was also the treasurer of the Board of the Hawaiian Evangelical Association, a corporation.

The first claim of appellants is that a bill should have been brought to reform the note and mortgage so as to conform with the real intention of the parties, or, at any rate, that this voluntary and unincorporated association should have been made a party to this suit. This is on their theory, as set up in their answer, that there was no mistake in the name of the mortgagee

in the mortgage and of the payee in the note and that they borrowed the money from the Hawaiian Evangelical Association and gave their note and mortgage to secure same to that association. But the circuit judge has found otherwise, and it is not attempted to be shown that his finding is erroneous. It also appears from the bill and is found by the circuit judge, and is not denied on this appeal, that after the execution of the mortgage a portion of the mortgaged premises was released to the defendants by the real mortgagee, the Board of the Hawaiian Evangelical Association, a corporation, and another portion released by the real mortgagee to one McCandless, a grantee of defendants. Upon the facts in this case there was no error in not seeking a reformation of the note and mortgage before foreclosing. See Wiltsie, *Foreclosure of Mortgages*, p. 329; 2 Jones on *Mortgages*, Sec. 1464; *Germantown Farmers' Mutual Insurance Co. v. Dhein*, 57 Wis. 521. It is not necessary that the Hawaiian Evangelical Association, the voluntary unincorporated association, should be a party to this suit, because it was shown that that association had no interest in the subject matter of the controversy.

The next claim of appellants is that there is a variance between the premises described in the mortgage and those decreed to be sold. The record on this appeal not disclosing the testimony on this point, we must assume that the decree is correct and this objection is therefore overruled.

The decree appealed from is affirmed and the case remanded to the third circuit judge of the first circuit.

Smith & Lewis, for plaintiff.

C. W. Ashford, for defendants.

IN THE MATTER OF THE ESTATE OF A. B. SCRIMGEOUR, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 3, 1905.

DECIDED NOVEMBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

Proceeds of insurance policies payable to the legal heirs of an intestate, although collected by the administrator, are not assets of the estate of the deceased and should be paid by the administrator to the legal heirs of the intestate.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from an order of a circuit judge directing the administrator to pay to the heirs of A. B. Scrimgeour the proceeds of certain insurance policies collected by the administrator from the insurance company. The policies were issued by the Western Mason's Life Insurance Company and were payable to the intestate's "legal heirs." Upon the appointment of the administrator he found the policies among the papers of the deceased, and, believing that he had a right as administrator to the proceeds of the policies, forwarded the necessary proofs of death and collected the proceeds. This money he has never paid out. About a year afterwards the heirs of the intestate demanded from him the proceeds of the policies, which demand was refused. It does not appear that the heirs knew or had an opportunity to know anything about these policies until long after the administrator had collected the proceeds thereof. Upon the hearing of the administrator's final accounts, it appeared that the estate was insolvent, and it was agreed by

all concerned, the heirs, the creditors and the administrator, that the circuit judge should decide whether the proceeds of the policies should be paid to the heirs or retained by the administrator for the benefit of the creditors, objections to jurisdiction being waived, and the parties reserving the right of appeal.

These policies were payable to the "legal heirs" and should have been paid to them by the insurance company. It is not contended by counsel for the administrator and creditors that the administrator had a legal right to collect the proceeds of the policies, but their contention is that the money, having been collected by the administrator in his official capacity and in good faith and under a claim of right for the estate, became an asset of the estate and should go to the creditors. This is on the theory that, if a debtor pays a wrongful claimant under an honest mistake of law, the rightful claimant cannot recover from the wrongful one in the absence of fraud or privity between them.

The right of the heirs to this fund is not as distributees or legatees but is derived entirely from the contract expressed in the policies. Their claim now is that the administrator is liable to them as for money had and received.

An action for money had and received may in general be maintained whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by justice and equity to refund. *Payne v. U. S.*, 93 U. S. 642; *McDonald v. Met. Life Ins. Co.*, 68 N. H. 4; *Lockwood v. Kelsen*, 41 N. H. 185. Counsel for the administrator claim that this action will not lie where there is no privity between the parties and cite in support of their contention, *Schultz v. Boyd*, 152 Ind. 166, and cases therein referred to.

But, in our opinion, there need be no privity between the parties, or any promise to pay, other than that which results or is implied from one man's having another's money which he has no right conscientiously to retain.

In *Finch v. Park*, 12 S. Dak. 63, it was said: "Here is money in the hands of one person to which another is equitably entitled, and it may be recovered in an action upon the implied

promise arising from the duty of the person in possession to pay it over to the person entitled. No privity of contract between the parties is required, except that which results from the circumstances."

Soderberg v. King County, 15 Wash. 194, was a case where money which belonged to plaintiff's assignors was without their knowledge paid to defendant under the mistaken belief that defendant was entitled thereto. The court said: "It is not pretended that the respondent has any valid or legal right to the moneys in controversy. It received the moneys of plaintiff's assignors without right or consideration, and it would be inequitable for it to retain the sums so received. Under such circumstances the law implies a promise of restitution for the benefit of the rightful owner."

In *Brand v. William*, 29 Minn. 238, it was said: "An action for money had and received can be maintained whenever one man has received or obtained possession of the money of another, which he ought in equity and good conscience to pay over. This proposition is elementary. There need be no privity between the parties or any promise to pay, other than that which results or is implied from one man's having another's money, which he has no right conscientiously to retain. In such case the equitable principle upon which the action is founded implies the contract and the promise. When the fact is proved that he has the money, if he cannot show a legal or equitable ground for retaining it, the law creates the privity and the promise. *

* It is not necessary that the defendant should have accepted the money under an agreement to hold it for the benefit of the plaintiff or that the party from whom he received it intended it for the plaintiff's benefit."

In *Allen v. Stenger*, 74 Ill. 119, it was said: "Assumpsit always lies to recover money due on simple contract. And this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund. Chit. Contr. 474. When, there-

fore, according to this rule, one person obtains the money of another, which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery. And it is not necessary that there should be an express promise, as the law implies a promise. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money, in justice, belong to the plaintiff, and has the defendant received the money, and should he in justice and right return it to plaintiff? These facts create a privity and the law implies the promise to pay."

In the case at bar the administrator still has the specific fund collected from the insurance company, and the question is, whether he shall pay it to the heirs, the persons to whom it belongs, or to the creditors, the persons to whom it does not belong. It is difficult to see how the administrator can by any action of his make assets out of that which in law does not constitute assets. When the facts of this case are tested by the rules above referred to, the result is that the administrator has possession of money which he has no right in justice and equity to retain and which should be paid over to the persons entitled thereto, namely, the heirs. The fact that the heirs might have had an action against the insurance company is immaterial. See *Brand v. William*, 29 Minn. 238.

The order appealed from is affirmed.

Ballou & Marx and *Cecil Brown* for the administrator and creditors.

Smith & Lewis for the heirs.

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MANUEL DE ARRUDA *v.* EDGAR MORTON AND
HANS AMUNDSEN.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED OCTOBER 16; 1905. DECIDED NOVEMBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PLEADING—*malicious arrest, action for—malicious search of plaintiff's premises.*

A complaint alleging an arrest of plaintiff caused by defendant maliciously and without probable cause, also a search of plaintiff's premises, etc., is an action for malicious arrest, since counts for injuries to character, (reputation) person and property cannot be joined, the arrest for injury from the search being meant to aggravate the damage from arrest and imprisonment.

BILL OF EXCEPTIONS—*practice—bill failing to recite exception shown by transcript—missing exhibit.*

An exception not shown in the bill of exceptions cannot be considered, although appearing in the transcript which the bill refers to and makes part thereof. The legal effect of a missing exhibit cannot be passed upon.

Id.

Exceptions are not sustained to refusal of the court to admit evidence of plaintiff's arrest on a former charge not mentioned in complaint; or to allow the sheriff to testify what took place before the grand jury concerning that charge; or to allow the magistrate to testify whether any one sat in front of him taking evidence in a civil action against the plaintiff; or to admit in evidence the record in that case, the trial judge having said "There was nothing in this record that says that Mr. Morton was the instigator of that suit."

OPINION OF THE COURT BY HARTWELL, J.

The action, which the complaint entitled "trespass on the

case," is named in the plaintiffs' brief "an action for malicious prosecution," which was "originally brought against Edgar Morton and one Hans Amundsen, but subsequently discontinued as against Amundsen." The plaintiff claimed damages resulting to him in that May 3, 1904, the defendants "did advise, counsel, conspire together and aided each other to falsely and maliciously and without probable cause, cause a warrant of arrest to be issued" by the district magistrate of Makawao for the plaintiff's arrest upon the charge of felonious branding of cattle the property of the defendant Amundsen, and that on this charge the plaintiff was arrested and imprisoned until he gave bail and afterwards having been released on bail was arraigned before the magistrate and acquitted of the charge.

Like averments are made of two subsequent warrants of arrest on similar charges, issuing May 6, 1904, acquittal following May 10, the third warrant being averred to have been procured by the defendants while the second charge was pending and that May 13, the plaintiff was acquitted thereof. The complaint further avers that the defendants conspired together, etc., and caused a search of the plaintiff's premises under a pretended search warrant and that the defendants with force and arms entered the plaintiff's premises and searched the same; that all of these acts on the part of the defendant, Morton, were done solely to harass and worry the plaintiff because of an appeal taken by him from a judgment against him, "in a cause or action prosecuted by said Edgar Morton, which charge was submitted to the grand jury of the Second Judicial Circuit during the June Term, A. D., 1904, of the said circuit, who failed to find an indictment, which charge was thereupon nolle prosequied, and the plaintiff herein fully acquitted and discharged."

It is averred that the alleged wrongful acts injured the plaintiff's "reputation, character and feelings" and put him to great expense to procure bail and were in contravention of his private rights under the laws and to his damage in the sum of \$5,000.00.

The statute which permits joining several causes of action for injuries (5) to character (reputation), (6) to the person and (7) to property requires that "the causes of action so united shall all belong to one only of these classes." R. L. Sec. 1743.

As the law does not permit joining counts for injuries to character, (reputation), person and property, we regard this as an action for malicious arrest, the averment of injury from the search of the plaintiff's premises being meant to aggravate the damages from his arrest and imprisonment. *Kerr v. Martin*, 7 Haw. 645.

The transcript shows that at the close of the plaintiff's case the defendant moved for nonsuit which the court granted, and that the plaintiff's attorney thereupon said, "We wish to note an exception to the ruling," the court saying "Note the exception." The bill of exceptions reads, "All records, files and proceedings in the above cause, including the clerk's minutes and stenographer's transcript of testimony as well as the affidavit of J. M. Vivas and the certificate of the clerk of the second circuit court, are hereby made a part of this bill of exceptions," and under the head of "Exception No. 8," recites that the court granted the defendant's motion for nonsuit on the ground that the plaintiff had not shown want of probable cause and that "the court erred in granting said motion in view of the fact that the plaintiff had made out a case showing not only want of probable cause on the part of the defendant but also malice," not reciting that the plaintiff excepted to the granting of a nonsuit. The defendant's attorney contends that therefore there is no exception to the nonsuit properly before the court. The repeated decisions of this court require us to sustain this contention. "The plaintiffs claim to have excepted to the refusal of the court to admit certain evidence offered by them, but these exceptions are not set out in the bill of exceptions. The bill contains the following in reference thereto: 'At the trial, the plaintiff, to sustain his case, offered certain evidence, which was ruled out by the court, as will particularly appear from the

transcript of the court reporter's minutes of the proceedings at the trial of said cause, to which several rulings of the court the plaintiffs duly excepted.' We have repeatedly held that all exceptions relied on by the appellant must appear on the face of the bill of exceptions, otherwise this court cannot consider them." *Harrison v. Bruns*, 10 Haw. 397. "The bill is objectionable because not exhibiting in detail the various exceptions taken during the trial, but referring to them as to appear in the stenographer's notes when prepared." *Dowsett v. Maukela*, *Ib.* 167. "The words 'The exceptions noted by defendant's counsel as appears by the stenographer's notes are referred to and made a part of this bill of exceptions' cannot be construed to cover the omission to set out the alleged errors in the bill itself." *Kapuakela v. Iaea*, *Ib.* 103. "Where the errors complained of are not squarely presented by the bill of exceptions, as in this exception, we shall follow the practice of this court and refuse to consider them." *Mist v. Kapiolani Estate*, 13 *Ib.* 526.

We see no reason for reversing the rule thus laid down, and therefore we decline to consider an exception to the order of nonsuit. The same is true of "Exception No. 9," reading, "That the court also erred in disallowing evidence in regard to former prosecution of plaintiff as shown by the evidence from the transcript of notes on page 55," and also of "Exception No. 7," which reads, "That thereafter plaintiff having subpoenaed a witness, John Miguel, and said subpoena having been issued at 4:45 p. m. April 11, 1905, and the same having been returned, and the plaintiff calling said witness who did not respond, the court erred in ordering the plaintiff to proceed with the trial, plaintiff claiming that John Miguel's evidence was material and having made formal offer of what said witness would testify to."

The plaintiff's exception (1) to the order of the court on its own motion striking from the files the plaintiff's exhibit "B" is not sustained since the bill of exceptions does not show what the exhibit is. All that appears in explanation of its contents

is found in the transcript, which recites that it contained an affidavit dated May 3, 1904, sworn to by the defendant, and a search warrant, and in the affidavit with the bill of exceptions and made part thereof, by J. M. Vivas, the attorney for the plaintiff at the trial who prepared the bill of exceptions, that it was "a paper purporting to be a search warrant issued by the district magistrate of Makawao on or about the 3d day of May, 1904;" that the affiant's information from the clerk was that "the paper disappeared on or about the day of the trial," that the warrant was sworn to by the defendant and signed by the district magistrate of Makawao. If, which we think is not good practice, we were to look to the transcript and affidavit to ascertain the contents of the missing exhibit we could not infer that it related to the plaintiff's premises or that the defendant's affidavit was made of his own knowledge and not upon information and belief which would lay no basis for aggravating damages. In *Territory v. Watanabe Masagi*, 16 Haw. 196, the court intimate in respect of a missing paper referred to in the bill of exceptions that on discovering its absence the attorneys ought to have "made proper application to the circuit court." We are unable to pass upon the legal effect of this exhibit. Even if it were legally admissible it would not tend to establish the plaintiff's right of action. "All that part of this declaration which relates to the search warrant and commitment is mere inducement and even less than inducement; it might have been stricken entirely out of the record and the cause of action would have been complete." *Mills v. McCoy*, 4 Cow. 409. "Mere matter of aggravation, not going to the cause of action, or mere inducement of explanatory matter not in itself essential to or the substance of the case, should not be traversed." 1 Ch. Pl., 16 Am. Ed. 641.

Exception 2 is to the refusal of the court to permit the magistrate to testify concerning the plaintiff coming before him on a charge of feloniously branding Mrs. Von Tempsky's cattle; exception 3, to its refusal to admit in evidence the circuit court record in that case showing that the defendant therein

having appealed from the district magistrate, the case was nolle pros'd June 9, 1904; exception 4, to its refusal to allow the sheriff to testify what took place before the grand jury concerning the charge against the plaintiff; exception 5, to its refusal to allow the magistrate to testify (apparently upon his record of an action against the defendant concerning the Von Tempsky cattle) whether he remembered any one sitting in front of him taking the evidence; exception 6, to its refusal to admit in evidence the record in that case, the court saying "there was nothing in this record that says that Mr. Morton was the instigator of that suit." None of these exceptions can be sustained. "At common law a grand juror could not, ordinarily, become a witness as to facts occurring or testified to in the sessions of the grand jury. 1 Elliott on Evidence, Sec. 641. "The rule as to secrets of grand jurors is generally the same as to prosecuting attorneys, clerks of grand juries, and witnesses before grand juries." *Ib.* 642. The records of the civil case and former criminal case would not tend to show the defendant's malice or want of probable cause for arresting the plaintiff in the cases for which this action is brought unless they showed facts connecting the plaintiff therewith in such a manner as to justify an inference of malice or want of probable cause, as for instance that he was instrumental in bringing or conducting the cases. We infer that the plaintiff sought to show that the defendant was taking evidence in the civil case, but it cannot be said that this fact would tend to show his malice. Although the exceptions were not so prepared as to enable us to consider the propriety of the nonsuit without intimating an opinion on that question, we observe that the complaint was originally drawn in a form applicable to an action on the case in the nature of conspiracy, in which both defendants are or neither of them is liable, since the conspiracy is the "gist of the action." The plaintiff having discontinued as against the defendant Amundsen, on whose affidavit the warrants of arrest were issued, he apparently claiming the property, other evidence than merely taking out the warrants would be required in order to hold this

defendant on the charge of causing the plaintiff's arrest maliciously and without probable cause. The plaintiff's present attorney calls our attention to facts in evidence which, as he contends, authorized an inference of malice, but for the reason stated we are not at liberty to pass upon their legal effect. The rule, however, has often been laid down in this court that "If an officer acts honestly and with ordinary discretion in commencing prosecutions against persons accused of crime public policy forbids that he should be annoyed and harrassed by suits for malicious prosecutions even in cases where the district magistrate may dismiss the charges." *Gaspar v. Nahale*, 14 Haw. 576.

The exceptions are overruled.

A. Perry for plaintiff.

M. F. Prosser for defendant.

AMERICAN-HAWAIIAN ENGINEERING & CON-
STRUCTION CO., A CORPORATION *v.* TERRI-
TORY OF HAWAII.

ORIGINAL.

ARGUED OCTOBER 30, 1905. DECIDED NOVEMBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EXTRAS UNDER CONTRACT—*amending petition.*

Demurrers to a petition and amended petition for extras under a contract for a wharf having been sustained because the requirement that orders for extras should be in writing was not shown to have been complied with or waived, leave to file a second amended petition so as to show that most of the items in question were not extras but were made necessary by the contract, specifications and plans, but were not contemplated by the parties owing to an alleged error in the plans, and so as to show that other items were

ordered or approved in writing, is denied because, as to most of the items, the plans, which are made part of the petition, do not support the allegation of error, and because, as to the minor items, assuming that they are allowable, the proposed amended petition as a whole should be in different form.

OPINION OF THE COURT BY FREAR, C.J.

A demurrer to the original petition was sustained in 16 Haw. 711, with leave to amend. A demurrer to the amended petition was sustained *ante* 28. A motion was made for general leave to further amend; this was denied but leave was given to amend the motion so as to ask for leave to make specified amendments. Such motion having been amended, the question is whether the proposed amended petition now presented is sufficient.

One of the claims in the original and first amended petition was for \$2040.80 for extra work under a contract for rebuilding Fort street wharf and the demurrers were sustained as to this claim because the petition did not show that such extras were ordered in writing as required by the contract or that such written orders had been waived if they could be waived. The amendment now proposed separates the items composing this claim.

One group of the separated items aggregates \$1910.05. It is not altogether clear from the proposed amendment just what the theory of the petitioner is in regard to this group. Most of the allegations that have already been held insufficient are retained. Apparently the changes in the statement of the claim are intended to show that the labor and materials making up this sum are not extras strictly speaking but were required by the contract itself though not contemplated by the parties to the contract, or, to express it another way, that they became necessary in order to carry out the contract although they were not in terms provided for in the contract and owing to alleged errors in the plans were not contemplated by the parties. The allegation chiefly relied on now is that the "contract, specifica-

tions and plans showed and required no drilling and blasting, and the plans on file in said Department of Public Works showed soundings calling for driving the piles through soft material to a coral substratum, which furnished a firm foundation, but in the execution of said work it was found that said plans were not a true representation of the actual conditions, but that the hard coral bottom was on an average in the case of 76 piles more than 17 feet nearer the surface, necessitating blasting, drilling and the other work and materials specified in order to drive said piles to the required depth." Upon examining the plans referred to in the contract and which are made a part of the petition, we find that they do not make the showing or requirement here alleged. Counsel, however, call our attention to certain rough pencil sketches on detached slips of paper which are claimed to be the "plans on file in said Department" referred to in this allegation, and not the plans referred to in the contract or in the words "contract, specifications and plans" in this allegation, and these we are informed by counsel are what they now rely on. These certainly are no part of the plans referred to in the contract. If they can be considered "plans on file in said department" and if such "plans" in this allegation can be considered as not the "plans" referred to in connection with the contract, still there is no showing that the petitioner relied on them or had a right to rely on them, and we may add they do not, as we view them, support the allegation of error.

The other items, amounting to \$18, \$10, and \$91.75 respectively, are relied on now as having been authorized or approved in writing. These might perhaps be proper subjects for amendments, but the proposed amended petition as a whole as it now stands cannot be allowed.

The motion for leave to amend in the form specifically requested is denied.

Castle & Withington for plaintiff.

M. F. Prosser, deputy attorney general, for defendant.

TERRITORY OF HAWAII EX REL. JOHN T. MOIR v.
HARRY A. KNELL.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED OCTOBER 31, 1905. DECIDED NOVEMBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COUNTY ACT—*power of sheriff to appoint police officer—approval of such appointments by board of supervisors or high sheriff.*

By Sec. 67, chapter 15 of Act 39, Laws of 1905, known as the County Act, the sheriff of the county of Hawaii may legally appoint police officers in that county. Neither Sec. 110a of the Act providing that "Any county officer may, with the approval of the board of supervisors, employ such clerks and other assistants as may be necessary to aid him in the performance of the duties of his office," nor paragraph 2 of Sec. 62 of the Act, which gives the board of supervisors power "to appoint such subordinate officers as they may deem necessary for the public service," refers to appointments of police officers. Such appointments made by the sheriff are not required to be approved by the board of supervisors or by the high sheriff.

OPINION OF THE COURT BY HARTWELL, J.

Upon the petition of John T. Moir, a citizen of the United States and of the Territory, residing at South Hilo, in the county of Hawaii, and a taxpayer in said county, setting forth that the respondent had during the previous two months claimed to be lawfully entitled to hold the office and exercise the functions of police officer in and for the district of South Hilo, county of Hawaii, and as such officer had assumed the right and authority to perform the duties of such office and had claimed and was still claiming to be entitled to remuneration

for his services therefor and to enjoy the privileges and emoluments of such office, and that the respondent was wholly without right in his claim so to do, which claim was based solely upon the respondent's appointment as such police officer by William M. Keolanui, the sheriff of the county of Hawaii, whereas the petitioner averred that the said sheriff had not the right or lawful authority to appoint or commission the respondent to the position aforesaid and prayed that an order of court be issued to the respondent inquiring by what authority he claimed to hold the office of police officer and that it should finally be adjudged that the respondent is not entitled to hold the said office and is not authorized to execute the duties thereof, a writ of quo warranto was issued by the judge requiring the respondent to answer the petition and show by what authority he claimed to hold such office as police officer and to observe what the court should direct in that behalf. The respondent's answer denied that he was without right in his claim to exercise the duties and functions of a police officer and to be entitled to remuneration for his services therefor, admitting as stated in the petition that his claim to the office was based solely upon his appointment as such police officer by the said sheriff, denying that the sheriff had not the right or lawful authority to appoint him and alleging that by virtue of the provisions of Act 39, being the county act of the session of 1905, and particularly of section 67, chapter 15 of said act 39, the authority to appoint police officers for the county of Hawaii was vested in the said sheriff, and that under the authority conferred by said act the respondent was duly and legally commissioned as police officer by the said sheriff and claimed to hold the office of police officer and was exercising the duties and functions of said office.

The circuit judge was of the opinion that section 67 of the county act, under which the respondent claimed for the sheriff the right to appoint police officers, does not give the sheriff that right but that the power of appointing police officers was granted by section 110a of the county act to the sheriff "with the approval of the board of supervisors," and as the respondent had

not such approval the judge found that he was occupying the position, exercising the functions and claiming the emoluments of a police officer for the district of South Hilo without authority of law and thereupon ordered, adjudged and decreed that the respondent was ousted from the office of police officer, from which judgment, order and decree the respondent appealed to this court.

The appellant makes the following contention: "The absolute power of appointment of police officers is conferred upon the sheriff by section 57 chapter 15 of the county act, which reads as follows:

'Subject to the special provisions of this act, the county sheriff of each county shall have and exercise all the powers, privileges and authority and be required to perform all the duties in his own jurisdiction * * * as are now by law provided to be had, exercised and performed by the high sheriff of the territory or by the sheriff of the various islands respectively; and shall have such other powers and duties as are by this act conferred.'

"Prior to the institution of county government, the sheriffs of the various islands, by Sec. 1558 Rev. Laws of Hawaii, were given 'the exercise, care, supervision and control of the police within their respective jurisdiction' and by Sec. 1564, Rev. Laws of Hawaii, were empowered 'for and within their respective jurisdictions, subject to the approval of the high sheriff, to *appoint* such deputies, sheriff and other police officers as occasion might require and to *dismiss* them in their discretion and in like manner to apportion the duties and adjust the compensation of such officers.' Further, by Sec. 1565 they were authorized to exact indemnity bonds from their respective deputies.

"The section of the Revised Laws above quoted have become modified by the county act and the meaning of the words 'subject to the *special provisions* of this act' becomes apparent on the modifications being ascertained. Amongst other modifications subject to which the county sheriffs have all the powers, privileges and authority enjoyed by sheriffs before the county act, are the following:

"Section 13 of the county act contains a 'special provision'

for the election of deputy sheriffs, thus depriving the sheriff of the power of appointing them.

"Sections 20 to 27 inclusive, contain provisions regarding the bonds of county officers, deputy sheriffs included, which differ materially from the provisions of chapter 106 of the Revised Laws.

"Section 60, as amended by Act 54, contains a 'special provision' for the removal, under certain circumstances, by the board of supervisors of any elected officer of the county (except supervisors). This includes deputy sheriffs who formerly might be dismissed by the sheriff.

"The supervisors also are empowered by subdivision 3, chapter 14, county act, 'to authorize and supervise the expenditure of all funds belonging to the county' and can regulate the number of police appointed by the sheriff by the appropriation made by them for the support of the police.

"Significance and effect can thus, it is apparent, be given to the words 'subject to the special provisions of this act' and yet the power of appointment of police still held to be conferred upon the county sheriff."

The appellee claims that the judgment of ouster can be sustained either on the ground upon which the circuit judge based his decision, namely "that police officers are within the class designated as clerks and other assistants by Sec. 110a of the county act"; or because by paragraph 2 of Sec. 62 of the act "the board of supervisors is given power to appoint such subordinate officers as they may deem necessary for the public service."

The claim that the power of appointing police officers is in the sheriff, subject to the approval of the board, can be sustained and is sought to be sustained on no other theory than by regarding police officers as "clerks or other assistants" of the sheriff "necessary to aid him in the performance of the duties of his office," within the meaning of Sec. 110a of the act. This construction cannot properly be placed upon that section. In statutes, as well as in contracts, words are construed with reference to their collocation by the rule *noscitur a sociis*. This is a common law rule of construction. The rule has been recog-

nized and declared by this court in respect of a steamship company's receipt for goods forwarded by its steamer. "The words in a receipt 'any other accident or dangers of the seas' can only mean that the dangers previously enumerated are of the same kind; no other construction is logical. The obvious meaning of this receipt is, that exemptions contained in it were limited to the sea route." *Gonsalves v. Wilder Steamship Company*, 9 Haw. 66, (1893.) "In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied, the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject matter." Broom's Legal Maxims, 591. "The general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words." Endlich on Int. of Stat. 563.

Although it is true, as remarked by the circuit judge in his opinion, that the manifold duties prescribed by law to be performed by sheriffs cannot in the nature of things be performed by them personally and police officers are "the proper assistants to aid in the performance of such duties," it is also true that if we should find that in another part of the act power is granted to the sheriff alone to appoint the officers there would be no occasion to infer that under the provisions of Sec. 110a the power was intended to be granted to the sheriff subject to the approval of the board, for this would make direct conflict between the grantees of this power and would be subversive of due and orderly execution of laws by sheriffs and police officers. It would clearly be a case in which the maxim applies, *expressio unius exclusio alterius*. It remains then to consider whether the power in question is vested in the board of supervisors under paragraph 2, Sec. 62 of the act or in the sheriff alone by virtue of the provisions above quoted from Sec. 67. Upon this subject the appellee correctly says that "The determination whether a

police officer is performing territorial or local functions does not determine the questions involved." There is therefore no occasion to consider the correctness of his claim that "While the preservation of the peace of a commonwealth is solely a state function and officers who assist in its performance are state officers, still they are such only in a limited sense. The state preserves the public peace but does so through the instrumentality of local self-governing bodies. In this sense a police officer is a state officer but he is essentially a county officer also."

The sheriff's right to appoint police officers in his county is so clearly defined in the county act that it is immaterial if true that such an officer is "a subordinate officer in the county system."

With reference to chapter 15 entitled "Sheriff," the appellant has correctly stated the special provisions of the act which modify the sections of the Revised Laws which declare "the powers, privileges and authority" of sheriffs. Sec. 62 of the act provides that "The board of supervisors of each county shall have general supervision and control of all the public affairs of their respective counties and the supervision of all subordinate officers." By Sec. 60 of the act the board also has power to impeach any elected officer except members of the board and to remove him from office upon charges of malfeasance or maladministration in office. If then a sheriff by vicious appointments of police officers should properly incur a charge of malfeasance or maladministration in office he would be subject to impeachment and removal by the board. We are at a loss to see what "powers, privileges and authority" which, prior to the enactment of the county act were "by law provided to be had, exercised and performed by the high sheriff of the territory or by the sheriffs of the various islands respectively" are by Sec. 67 granted to the county sheriff of each county if the power of appointing police officers is not granted. We think that the power of appointment is undoubtedly thereby granted to the sheriff.

We do not think that such wide discretionary power was

meant to be vested in the board as to enable it to say whether or not police officers were "necessary for the public service." Such power would enable its grantees to obstruct the enforcement of law by neglecting to make appointments or by appointing officers who would not regard the orders of the sheriff.

While entertaining no doubt that the meaning and effect of Sec. 67 relating to sheriffs are, as we have above stated, it is only after careful consideration that we have come to the conclusion that sheriffs' appointments are not subject to the approval of the high sheriff, or, if made upon the Island of Oahu, of the attorney general. It was not contended by counsel upon either side that such approval is requisite. Any other construction of the section would fail to harmonize with the general intent of the act by giving to appointive territorial officers power to negative and thereby control police appointments made by elected county sheriffs in no way under their control. Before the county act went into effect, when sheriffs were appointed by the high sheriff, it was proper that the selections of police officers made by sheriffs should be subject to the approval of the high sheriff. It could hardly be otherwise if sheriffs were to remain subordinate to him and subject to his directions in other matters. Any other rule would have prevented the evils of a house divided against itself and worked injuriously upon the entire department of justice. If the statute had declared that "county sheriffs shall have all the powers heretofore by law provided to be had by the high sheriff" and (instead of or) "the sheriffs of the various islands respectively," it would be obvious that appointments were in no case subject to approval. "Each of the terms 'or' and 'and' has the meaning of the other or both, where the subject matter, sense and connection require such construction." Sec. 15, R. L. A similar conclusion would follow by omitting the word "respectively" and retaining "or" in the context.

We accordingly hold that the appointment of the respondent as a police officer for the district of South Hilo by the sheriff of the county of Hawaii was valid.

The judgment appealed from is reversed; judgment may be entered for the respondent.

Carl S. Smith for the petitioner.

Holmes & Stanley for the respondent.

NORMAN K. LYMAN v. CHAS. K. MAGUIRE, AUDITOR
OF THE COUNTY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED OCTOBER 30, 1905. DECIDED NOVEMBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COUNTY ACT—*auditor—warrant.*

The county auditor may refuse to draw a warrant on the treasurer for an invalid claim against the county although such claim has been examined, allowed and ordered paid by the board of supervisors.

Id.—*appointment of sheriff's clerk.*

Under the county act the board of supervisors has no power to appoint a sheriff's clerk, that power being in the sheriff subject to the approval of the board of supervisors.

OPINION OF THE COURT BY WILDER, J.

This is an application by Norman K. Lyman, the petitioner, for a writ of mandamus to compel the auditor of the county of Hawaii to issue to petitioner a warrant on the treasurer of said county in payment of petitioner's claim for salary for the month of July, 1905, as clerk to the sheriff of Hawaii. After a hearing the circuit judge denied a peremptory writ, from which ruling and judgment thereon the petitioner appealed to this court.

On or about the 1st of July, 1905, the board of supervisors of the county of Hawaii appointed petitioner clerk to the county

sheriff of Hawaii. Previous to this time petitioner had been clerk to the territorial sheriff of Hawaii. Petitioner remained in the county sheriff's office during the month of July and did certain work, apparently under the direction of the board of supervisors. The county sheriff of Hawaii, who did not qualify until a week or so after July 1, refused to recognize petitioner as his clerk, never appointed him as such, and, in fact, appointed someone else to that position, which appointment was not approved by the board of supervisors. On August 11, 1905, petitioner presented to the auditor a written demand for \$75, alleged to be due petitioner as his salary for the month of July as clerk to the sheriff of Hawaii, which demand was approved by the board of supervisors, countersigned by J. T. Moir, chairman of said board, and attested by the county clerk. Upon such presentation the petitioner demanded that the auditor issue to him a warrant for \$75 upon the treasurer of the county of Hawaii in accordance with his claim. This demand the auditor refused, whereupon petitioner instituted these proceedings.

Two questions are presented for consideration, namely, first, could the auditor refuse to issue a warrant for a claim allowed by the board of supervisors which he alleged was invalid, and, second, if so, was the claim as a matter of law invalid?

1. Petitioner claims that the action of the board of supervisors in allowing the claim is conclusive on the auditor and that the auditor cannot question the validity or invalidity of any claim so allowed. In our opinion this contention is without merit. Section 75 of Act 39 of the Session Laws of 1905, commonly known as the county act, provides that the auditor "shall issue warrants on the county treasurer in favor of persons entitled thereto in payment of claims and demands chargeable against the county which have been legally examined, allowed and ordered paid." In the first place, the auditor shall only issue a warrant to a person *entitled* thereto, and, in the second place, only for a claim against the county which has been *legally* examined, allowed and ordered paid by the board of supervisors. It is contended that "legally" in this latter provis-

ion means "in a legal manner," but in view of another section of the county act that contention cannot be upheld. Under section 62 of the county act the board of supervisors has the power to authorize and supervise the expenditure of all funds belonging to the county and to enforce all claims on behalf of the county and "approve all lawful claims against the county." Thus, the only claims that the board of supervisors can approve, for which claims warrants shall issue, are "lawful" claims. To say that the board of supervisors may determine what are lawful claims and what are not lawful claims, and that such action by the board is binding and conclusive on every one, would be to put it in the power of the board to nullify that very provision and would be giving to the board a power which the act in question does not give. Such a construction would also put it in the power of the board to order paid, without being questioned, a claim against the county which subdivision 7 of section 9 of the county act provides "shall never be the basis of a claim against the county." It is clear that the board has no such power. A county auditor has the right in a proper case to question the validity of claims allowed and ordered paid by the board of supervisors.

It is conceded that the auditor could refuse to draw a warrant for a claim that was fraudulent, although examined, allowed and ordered paid by the board of supervisors, but we can see no distinction, so far as the power of the auditor is concerned, between a fraudulent claim and one that is not legal. See *People v. Wood*, 35 Barb, 656.

2. Is petitioner's claim a lawful one? This depends on whether or not the board of supervisors had the power to appoint him as sheriff's clerk. It is claimed that the board did have this power under subdivision 2 of section 62 of the county act, which provides that the board shall have the specific power to "appoint such subordinate officers as they may deem necessary for the public service", which is a general provision and might be applicable in the absence of any particular provision to the contrary. Section 110a of the county act provides that "Any

county officer may, with the approval of the board of supervisors, employ such clerks and other assistants as may be necessary to aid him in the performance of the duties of his office, and may, without such approval, remove the same." This last section is a particular specific provision covering the appointment of sheriffs' clerks, and in case of a conflict would undoubtedly control subdivision 2 of section 62. But there is no conflict between the two sections. A statute should be so construed as to make it consistent in all its parts and so that effect may be given to every section, clause or part of it. See *Ambler v. Whipple*, 139 Ill. 311; *Calhoun Gold Mining Co. v. Ajax Co.*, 27 Colo. 1. Even if the sheriff's clerk is a subordinate officer, still the power of the board of supervisors under section 62 to appoint such subordinate officers as they may deem necessary for the public service refers only to such subordinate officers whose appointment or election is not otherwise provided for in the county act, and the appointment of a sheriff's clerk is specifically provided for in section 110a.

The claim of petitioner that there is a dual method provided for appointing sheriffs' clerks, that is, ordinarily by the sheriff and under some circumstances by the board of supervisors, does not meet with our approval, for the reason that such a construction would lead to a conflict of authority. Either the board of supervisors or the sheriff has the power of appointment of the sheriff's clerk, and as the county act specifically provides that the sheriff shall appoint his own clerk, with the approval of the board of supervisors, that would seem to settle the question. And it is only right that the sheriff should appoint his own clerk.

It was also claimed that inasmuch as there was no qualified county sheriff for a week or so after July 1, and consequently no sheriff's clerk could be appointed by the sheriff, this appointment was justified and the writ should be made absolute. But this claim is mainly for salary after the sheriff was qualified and consequently in a position to make his own appointment. Whether or not petitioner is entitled to be paid by the county

for the work done by him up to the time that the sheriff qualified it is unnecessary to say, because that question does not arise in this case.

The order of the circuit judge denying the peremptory writ is affirmed.

Carl S. Smith for petitioner.

Holmes & Stanley for respondent.

COUNTY OF KAUAI, EX REL. JOHN D. WILLARD,
COUNTY ATTORNEY, AND ALBERT S. WILCOX,
WILLIAM H. RICE AND GEORGE N. WILCOX,
CITIZENS, VOTERS AND TAX PAYERS IN THE
FOURTH TAXATION DIVISION AND COUNTY
OF KAUAI, ON BEHALF OF THEMSELVES AND
OTHERS SIMILARLY SITUATED v. JAMES L.
HOLT, TAX ASSESSOR OF FIRST TAXATION
DIVISION AND J. K. FARLEY, TAX ASSESSOR
OF FOURTH TAXATION DIVISION.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

ARGUED OCTOBER 23, 24, 1905. DECIDED NOVEMBER 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

INCOME TAX—corporation assessable in what taxation division.

Under the income tax law which requires each corporation to make a return in "its taxation division" and also all persons and corporations to make their returns in the taxation division in which they "reside, locate or do business," corporations as well as persons should in general make their returns in the division in which they reside, if they reside in the Territory, and in the division in which they do business, if they reside without the Ter-

ritory; not in the division in which their property is situated, if that is a different division.

CORPORATION RESIDENCE—*where, for purposes of taxation.*

The residence of a Hawaiian corporation is necessarily in the Territory of Hawaii—the place of its creation. As between different taxation divisions within the Territory, its residence is in that in which it holds its stockholders' and directors' meetings, keeps its stock books, directs the management of its business, conducts its general financial transactions and performs its corporate functions, especially if the place of its principal office is declared by its charter or articles to be in that division; not in that in which most of its property is situated and in which it conducts most of its business so far as actual production is concerned and keeps most of its books of original entry, if that is a different division. The mere fact that its directors' meetings also are held in the latter division is not sufficient to make that its residence; nor is the fact that most of its stock is owned by one person who resides in the latter division and manages the property much as he pleases sufficient. If its meetings are held and its general corporate functions performed without the Territory and its charter does not designate its principal office the latter division is its place of taxation—as being either its residence or its place of business in the Territory.

MANDAMUS—*denied, when no legal duty.*

There being no legal duty on the part of the assessor of one division to send tax returns filed with him to the assessor of another division where similar returns should have been filed, mandamus to compel him to do so is denied.

Id.—*denied, when useless.*

Mandamus to compel the assessor of the division in which a corporation should have made its return, to assess and collect its income tax, is denied, it appearing that it had no assessable income during the year in question.

Id.—*parties.*

When a statute requires one half of the income taxes collected by the Territory to be turned over to the county in which they are collected, and the assessors of two taxation divisions, covering two counties respectively, act on the theory that certain corporations should be assessed in one of those divisions, and mandamus is brought to compel the assessor of the other division to make such assessments, the county in the first division is not a necessary party.

OPINION OF THE COURT BY FREAR, C.J.

When county government was provided for (Laws of 1905, Acts 39, 54) no system of county taxation was established, but the Territorial system of taxation was retained, and portions of the Territorial funds were required to be paid over to the counties for their support. Among other things it was provided (Laws 1905, Act 93) that "fifty per centum of the total amount of poll and school taxes and taxes on property and *incomes*, collected in each county, shall be paid by the treasurer of the Territory of Hawaii to the treasurer of such county in the following manner," etc. Ever since the enactment of the income tax law in 1901 (R. L., Ch. 99) the sugar corporations, which in general have their principal offices with their agents in Honolulu and their plantations in other parts of the Territory, as a rule have made their income tax returns, and such taxes have been assessed and collected, at Honolulu in the Island of Oahu, now the county of Oahu, which corresponds with the first taxation division, but in 1904 and 1905 certain corporations having their plantations on the Island of Kauai, now part of the county of Kauai, which corresponds with the fourth taxation division, proposed to make their returns and be assessed and pay their income taxes in that division, but the assessor of that division and of the first division, under the directions of the treasurer of the Territory, declined to accede to that proposition and insisted that such returns should be made and the taxes assessed and collected in the first division. In consequence of this action and the provision referred to for the payment of half the income taxes collected in each county to the treasurer of such county, the county of Kauai and several tax-payers thereof now make this application for a writ of mandamus to compel the respondent Holt, assessor of the first division, to forward to the respondent Farley, assessor of the fourth division, the income tax returns for this year received from the said corporations, which proposed to make their returns in the fourth division and certain other corporations,

namely, Lihue Plantation Co., Ltd., Koloa Sugar Co., Ltd., Kekaha Sugar Co., Ltd., McBryde Sugar Co., Ltd., Hawaiian Sugar Co., Waimea Sugar Mill Co., Princeville Plantation Co., Ltd., and Kilauea Sugar Co., and to compel the said respondent Farley to assess and collect the income taxes of the said corporations in the fourth division. The circuit judge of the fifth circuit, after a hearing upon the evidence, denied the application and the petitioners appealed.

The question is whether the income taxes of these corporations should be assessed and collected in the first or in the fourth taxation division. Of these corporations the four first mentioned were incorporated under the joint stock company act of 1890 which requires (R. L., Sec. 2536) that the articles of association of such a company shall set forth, among other things, "the place of its principal office," and the articles of each of these four corporations provide that the principal office shall be in Honolulu, although they provide also that there may be branch offices elsewhere. The remaining four corporations, namely, the Hawaiian Sugar, Waimea, Princeville and Kilauea companies, were chartered under the former corporation law, which, so far as it remains in force, is found combined with the joint stock company act in chapter 157 of the Revised Laws, and which did not require a charter to state the place of the principal office of the corporation, but in the case of the Hawaiian Sugar Co. the charter does in fact state that the principal office of the corporation shall be at Honolulu. It does not appear from the evidence whether similar statements are made or not in the charters of the Waimea, Princeville and Kilauea companies, but we are informed by counsel that such a statement is contained in the charter of the Waimea Company, but not in that of the Princeville or of the Kilauea company. We presume that such a statement in a special charter, though not required by law, as is true also of many other statements found in special charters, would have the same effect as a similar statement in articles of association filed under a general law which requires such a statement, although it might be

nugatory (see *Milwaukee S. Co. v. City of Milwaukee*, 83 Wis. 590) if made in such articles filed under a general law which does not require such a statement.

All these corporations have practically all their property in the fourth taxation division and of course carry on their business there so far as actual production is concerned. Most books of original entry also are kept there. The majority of the directors and stockholders reside elsewhere. The directors' and stockholders' meetings are held in Honolulu in the first taxation division, except that the directors' meetings of the McBryde Sugar Co. are held in the fourth division and the directors' and stockholders' meetings of the Kilauea Sugar Co. are held in California. The minute books, stock books and various other books of a general nature are kept in Honolulu, the general financial transactions are conducted there and dividends are payable there, except that the minute books of the directors' meetings of the McBryde Co. are presumably kept in the fourth division, and all books and transactions of the kinds mentioned are in the case of the Kilauea Sugar Co. kept and performed in California, and the dividends of perhaps one or two of these corporations are payable in California, and perhaps also in the fourth division, as well as in Honolulu. The sugar produced by these corporations is sold through the Honolulu agents, except in the case of the Kilauea Sugar Co., whose sugar is probably sold through the agents in California, and the Princeville Plantation Co., which has ceased to produce sugar and whose income is derived principally from rentals of land cultivated in rice and from cattle raising.

The petitioners contend that the income tax is in effect a tax on property (*O. R. & L. Co. v. Pratt*, 14 Haw. 126), that the underlying principle of taxation in this Territory, as shown by the general property tax law (R. L., Ch. 98) is that all property shall be taxed where it is situated, that the income tax law (Id., Ch. 99) does not show clearly an intention to depart from that principle and that a clear showing should be made in order to take the case out of the general rule; also that, if such gen-

eral rule is held not to apply to income taxes, such taxes should be assessed and collected either at the corporation's principal place of business or, if at the place of its principal office, that such place should be regarded under the evidence in these cases as being in the fourth taxation division. The respondents contend that the income taxes of a corporation should be assessed and collected where it resides, that the residence of a corporation is the place where it has its principal office and performs its general financial transactions, that the statement in its charter or articles of association of the place of its principal office is conclusive evidence that that is its residence; also that, if such is not the case, still the evidence shows that the principal offices of the corporations in question are at Honolulu in the first taxation division.

The income tax law provides (R. L., Sec. 1282) that every corporation subject to the tax shall make its return "to the assessor of its tax division." Which is its tax division? Is it the division in which most of its property is located and most of its business, other than the direction of its management and its financial affairs, is conducted, or the division in which it has its principal office, its meetings, its stock books, and in which it directs the management of its property and performs its general financial transactions? If the tax were strictly a property tax and there were no statutory provision on the subject, doubtless the real property would be taxable at its situs and the personal property at the residence or domicile of its owner. But not only is an income tax not strictly a property tax, although for some purposes it is such in effect, but the place at which it shall be assessed is a proper subject of statutory enactment, and in the next section (1283) the legislature has expressly provided where the returns shall be made. This section provides that "It shall be the duty of all persons * * * and of all corporations made liable to income tax to make and render a list or return * * * to the assessor of the *division in which such persons or corporations reside, locate or do business* of the amount of their or its income, gains and profits as aforesaid;

and all guardians, trustees, executors, administrators, agents, receivers, and all corporations or persons acting in a fiduciary capacity, shall make or render a list or return as aforesaid to the assessor of the *division in which such person or corporation acting in a fiduciary capacity resides or does business* of the amount of income, gains and profits of any minor or person for whom they act," etc. This section controls the preceding section by making the place of residence or of business the place of taxation,—very much as section 1227 of the general property tax law controls section 1226 by making the situs of property, both real and personal, the place of taxation. It is clear that section 1283 prescribes for income taxes a different rule from that of the situs of the property so far as natural persons are concerned, and we cannot discover in this section any intention on the part of the legislature to make the rule in regard to corporations or artificial persons different from that as to natural persons. There is no inherent reason why there should be any difference in this respect. Corporations as well as persons may reside in one place and do business or own property in another place or in several different places; and in this section persons and corporations are associated without any distinction, and not only that, but both persons and corporations acting in a fiduciary capacity are required to make their returns where they reside or do business irrespective not only of the place where their beneficiaries reside or do business but of the place where the property producing the income is situated. Nor can the contention be sustained that the words "reside, locate or do business" should be distributed so as to make the word "reside" apply to persons and the words "locate or do business" to corporations, for the tax is imposed upon both persons and corporations residing without the Territory but doing business within the Territory as well as upon those residing within the Territory. The more appropriate distribution of these words, therefore, would be in general to apply the word "reside" to persons or corporations within the Territory and the words "do business" to persons or corporations doing business in the Ter-

ritory but not residing there, that is, to make all these words apply to both persons and corporations according as they can apply under various circumstances so as to cover all cases. See *Union Steamboat Co. v. City of Buffalo*, 82 N. Y. 351. Whether there might be circumstances that would require a different distribution of these words in any particular case, or whether the words in the first part of the section requiring returns to be made by persons and corporations where they reside or do business might under some circumstances be controlled by the latter part of the section requiring returns to be made by agents, etc. where they reside or do business are questions not presented in this case. The place of taxation is a matter of policy which is subject to change by the legislature. Whether, now that these taxes are to be divided between the Territory and the counties, the policy should be changed is a question with which we have nothing to do. The act which requires such division contains no suggestion of an intention to make such change. The inference that would naturally be made from nonaction on the part of the legislature is that, presumably knowing that such taxes have been assessed and collected in the first division ever since the enactment of the income tax law, it intended to allow that practice to continue or else overlooked the matter. Deciding then that the place for assessing the income tax in the case of a corporation is in general the place of its residence if that is in the Territory, and the place where it does business in the Territory if it does not reside in the Territory, the question remains, where do the corporations in question reside or do business.

All these corporations being Hawaiian corporations must be deemed to be residents of Hawaii. See *Galveston etc. Ry. v. Gonzales*, 151 U. S. 496. Therefore, in the case of the Kilauea Sugar Co. which alone has what perhaps might be considered its principal office without the Territory, and which has no office so far as appears from the evidence in the first taxation division or elsewhere in the Territory except in the fourth division, its residence must be held to be in the fourth taxation

division where its property is situated, its business conducted and its office kept in the Territory. Even if it could be considered as residing in California still its income tax would be assessable in the fourth division under the alternative provision of the income tax law that it should be assessable in the division in which it does business.

In the cases of the other corporations the question is whether they reside in the fourth division where they hold and manage their property or in the first division where they hold their meetings, keep their stock books and other books of a general nature and perform their general financial transactions. As was said in *Guinn v. Ia. Cent. Ry. Co.*, 14 Fed. 323, "The 'principal place of business' is no test of residence, whether of a corporation or natural person. A natural person might reside in one state and have his principal, or, for that matter, his sole place of business in another state." In that case the statute provided that suit should be brought in the division in which the defendant had its residence and the court declined to transfer the case from the southern division of Iowa, in which service had been made on the corporation's agent, to the central division of the same state, in which the corporation had its principal place of business,—the fact that it had its principal place of business in one division not being deemed sufficient to show that its residence was not in another division. In *Middletown Ferry Co. v. Town of Middletown*, 40 Conn. 65, the corporation conducted its business of running ferry boats in the town of Middletown but held its stockholders' and directors' meetings and kept its books and papers, except such as were in daily use in carrying on its business in the town of Portland. The court held that Portland was its principal place of business and that it should be assessed there although the tax was a property and not an income tax and the statute provided that corporations should be taxed, not where they resided or where their principal office was, but where they had their principal place of business or exercised their corporate powers. The court said:

"We think it is clear that the principal place of the business of a corporation, or where it exercises its corporate powers, within the meaning of the statute, is where the governing power of the corporation is exercised; where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. It may be true in the sense '*qui facit per alium facit per se*,' that a corporation may be said to exercise its corporate powers wherever its business is being transacted, but in this statute the expression is used in a stricter sense. It has reference to what is done directly by the corporation itself in the management of its affairs, and not to what is done by others in obedience to its requirements." In *State v. Tenn. Coal, etc. Co.*, 94 Tenn. 295; 29 S. W. 116, the corporation had officers in at least six different places; its directors met in New York City and its stockholders at Tracy City, Tennessee; its president's and secretary's offices were at Nashville, and its obligations were entered into and its cash deposits were mainly at that place. It was held that the domicile of the corporation was at Tracy City, inasmuch as its primary governing and controlling power was exercised there, and that it was therefore properly assessable there. In *Galveston etc. Ry. v. Gonzales*, supra, the court, after referring to previous decisions to show that a domestic corporation was a citizen and an inhabitant of the state in which it was incorporated and that none of such decisions showed that where a state was divided into two districts a corporation should be treated as an inhabitant of each district of the state in which it does business or of any district other than that in which it has its headquarters or such offices as answer in the case of a corporation to the dwelling of an individual, said that it was compelled to determine the question of the domicile of a corporation under such circumstances either by resort to general principles or to local statutes, and that "in the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted, even though it may transact its most important business in another place," and that "if the corporation be created by the laws of a state in which there are two judicial districts, it should be considered

an inhabitant of that district in which its general offices are situated and in which its general business, as distinguished from its local business, is done," and that "the rulings of the state courts generally favor the position that a corporation can only be considered as resident in the jurisdiction in which its principal offices are located, though it may run a railway and have local agents in other jurisdictions." The court cited in support of this statement a number of state cases, including several relied on by the respondents in the present case, and cited as holding the contrary view several state cases, including one of those relied on by the petitioners in the present case. Other cases in which a contrary view is taken are *Tobin v. Chester etc. Co.*, 47 S. C. 390; 25 S. E. 283, and *Boyd v. Blue Ridge R. Co.*, 65 S. C. 328; 43 S. E. 817, in which the South Carolina court declined to follow the decision of the federal supreme court in the case above mentioned to the effect that a corporation had only one residence, namely, at the place of its principal office, for the purpose of being sued, and held that it might have residences for that purpose both there and in other places where it was doing business. Even if that were so with reference to service of process, it would not necessarily be so with reference to taxation. In *Frick Co. v. Norfolk etc. Co.*, 86 Fed. 725, it was held that where the place of the chief office of a corporation is not designated by its charter or the vote of its stockholders or directors it is where its stockholders and directors usually meet, and where it elects its officers and conducts its financial operations. See also cases there cited, and *Ford v. Stone*, 58 S. W. (Ky.) 373.

These cases would seem to be sufficient to show that the Waimea Sugar Mill Co. and the Princeville Plantation Co., Ltd., reside and are properly taxable under the income tax law in the first taxation division, even if their charters do not provide that the place of their principal office is Honolulu. There can be no doubt of this in the case of the Waimea Co. and, in our opinion, the same rule applies in the case of the Princeville Co. although a single individual apparently purchased all of its shares and now holds all but four of them, which he transferred to others for the purpose of complying with the laws, and although he resides in the fourth taxation division and there manages the corporation property much as he pleases. The evi-

dence shows that directors continue to be elected and hold their meetings in Honolulu and that more or less of the business of the corporation, as, for instance, the collection of some of its rents, is transacted in Honolulu.

There is stronger reason for holding the same way in the cases of the other five companies, namely, the Lihue, Koloa, Kekaha, McBryde and Hawaiian sugar companies, inasmuch as their articles of association or charters expressly provide that the places of their principal offices shall be in Honolulu. The case of the McBryde Co. cannot be distinguished from the others from the mere fact that its directors' meetings are held in the fourth division, and that seems to be the view taken in *State v. Tenn. Coal etc. Co.*, supra, even when the charter did not provide where the place of the principal office should be. In *Western Transportation Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *Union Steamboat Co. v. City of Buffalo*, supra; *People v. Barker*, 34 N. Y. Supp. 269 and 36 *Id.* 844, and *Pelton v. Transportation Co.*, 37 Oh. St. 450, the New York and Ohio courts held that the statement of the place of the principal office in the articles or charter was conclusive even though the corporation should in that way establish its principal office in a place other than that in which it transacts most of its business for the express purpose of avoiding taxation. In *Transportation Co. v. Assessors*, 91 Mich. 382, and *Milwaukee S. Co. v. City of Milwaukee*, supra, the Michigan and Wisconsin courts disapproved the New York and Ohio decisions in so far as they held that the statement in the articles or charter was conclusive, and held that if the place of the principal office was so stated falsely and for the purpose of avoiding taxation it should not control, although those courts were not required to go to the extent of holding that the New York and Ohio decisions were wrong, for both the facts as to where the general business of the corporations was conducted and the specific requirements of the statutes were different in those cases. Neither of those courts intimated that if the articles or charter stated the place of the principal office

and the directors' and stockholders' meetings and stock books were kept and the general financial transactions of the company were performed in such place it would not be the residence of the corporation even though most of its property was located and most of its business conducted elsewhere.

Although we hold that on the evidence now before us the Kilauea Sugar Co. should have made its return in the fourth division, it does not follow that the assessor of the first division should be required to send the return of that company to the assessor of the fourth division, and he is under no legal duty to do so. The company should make its return to the assessor of the fourth division irrespective of whether it has made a return to the assessor of any other division. We, however, see no reason why the assessor of the first division should not voluntarily send the return to the assessor of the fourth division. Nor does it follow that a writ should issue to compel the assessor of the fourth division to assess or collect the income taxes of this company, for the petition itself, and the evidence also as far as it goes, shows that this company had no assessable income for the year in question, and the writ of mandamus may well be refused when its issuance would serve no useful purpose.

The respondents' contention that the county of Oahu is a necessary party is not sustained.

The order appealed from dissolving the alternative writ and denying the petition is affirmed.

J. D. Willard, county attorney of Kauai, *D. H. Case* and *Smith & Lewis* for petitioners.

M. F. Prosser, deputy attorney general, for respondents.

J. A. MAGOON, EXECUTOR, v. PIONEER MILL COMPANY, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED NOVEMBER 7, 1905. DECIDED NOVEMBER 10, 1905.

HARTWELL AND WILDER, JJ., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF FREAR, C.J.

EJECTMENT—practice—question of legality of substitution of executor as plaintiff by acquiescence of defendant not raised at trial, not open on general exception to decision.

At the trial suggestion was filed by one of the attorneys in plaintiff's case that she had died, that her will was probated and that he, as executor, had letters testamentary and asked to be substituted as plaintiff. The defendant's attorneys saying they made no objection the court allowed the executor to be entered as plaintiff. The defendant, in arguing the exceptions, urged that the question that the executor was not a proper plaintiff was presented by the exception to the decision as "contrary to the law and the evidence and the weight of the evidence." Held, no ruling upon this question having been made at the trial and no question of law relating to it having arisen there, in view of defendant's acquiescence in the substitution of the executor as plaintiff, although in law not entitled to possession of land, his right in this judgment cannot properly be questioned by the general exception to the decision, the defendant being regarded as having waived objections to the plaintiff's capacity.

10.—adverse possession as against a minor—exceptions to rulings denying nonsuit and excluding evidence which afterwards went in or was immaterial.

The defendant moved for a nonsuit on the ground that the plaintiff's evidence showed adverse possession for ten years. The exception to refusing the nonsuit is not sustained since the statute would not run against the minor child living when as the defend-

ant claimed adverse possession began, and also since evidence of adverse possession of a house on the premises would not include the entire parcel in which were six taro patches unless possession was taken under a paper title or colorable claim. Exceptions to excluding or striking out evidence which afterwards went in are overruled because no harm was done. Exceptions to ruling out certain other evidence, being a foreclosure affidavit and mortgage and that the widow said when possession of the house was taken, are overruled because the evidence was immaterial. Evidence of attempts to prove that a certain person was an officer of a company which bought the land and letters to that company and to the defendant demanding possession do not require discussion. Evidence properly allowed in rebuttal.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of ejectment brought February 6, 1901, to recover possession of about one and one-half acres of land granted Sept. 15, 1851, to Puali by L. C. A. No. 6606, Royal Patent No. 2726, and for \$500 damages for its detention. The patentee's heir, his son, J. L. Kapakahi, dying intestate, J. W. Kalua was appointed administrator of the estate September 7, 1888, and Alana was appointed guardian of the property of his minor child Kealo, a daughter. At a foreclosure sale, April 1, 1889, under Kapakahi's mortgage of October 26, 1887, of certain pieces of land, not including the land in question, Kalua bought the mortgaged property and, for some reason which does not appear, considered that he had bought this land which he conveyed June 18, 1892, to William L. Decoto, whose company, the Lahaina Coffee and Fruit Co., conveyed it to the defendant August 24, 1900. The widow of Kapakahi went to the leper asylum on Molokai in September, 1890. The child dying between that date and the bringing of this action the estate vested in the widow.

At the trial, May 10, 1905, jury being waived, Magoon, one of the attorneys in the plaintiff's case, filed his suggestion of the plaintiff's death November 3, 1904, that March 29, 1905, her will was admitted to probate, that as executor he had received

letters testamentary, and asked to be substituted as plaintiff. The defendant's attorneys saying that the defendant made no objection, the court allowed the executor to be entered as plaintiff. After hearing the case, in which the sole defense was adverse possession, a decision was filed stating that the defendant "has failed to show that it and its predecessors in title have held the said premises adversely to the plaintiff for the period of ten years," and giving judgment that the plaintiff have restitution and possession of the land and have and recover of the defendant \$500 damages.

The plaintiff's evidence showed that after Kalua's purchase he ousted the widow from the house upon the land and that after residing about two months in a neighboring house she went to Molokai, although the witness could not testify who had charge of the land.

The defendant excepted to the refusal of the court to grant its motion for a nonsuit upon the ground that the plaintiff's evidence showed adverse possession for ten years. The exception is not sustained since the statute would not run against the minor child who was living when Kalua took possession, and also since the evidence of adverse possession of the house would not include the entire parcel, in which there were six taro patches, unless upon a showing, which is not made, that Kalua took possession under a paper title. Whatever he supposed, we see no evidence on which he could have based a colorable claim.

The defendant's attorneys in argument urged that the question that the executor was not a proper plaintiff is presented by the exception to the decision as "contrary to the law and the evidence and the weight of the evidence." No ruling upon this question was made at the trial and no question of law relating to it arose there. The defendant says that if the executor is allowed to take judgment it may be exposed to another action by the devisee of the land for damages, but in view of the defendant's acquiescence in the substitution of the executor as plaintiff, although an executor is not in law entitled to possession of land, we do not think that his right in this judgment

can properly be questioned by the general exception to the decision. The defendant must be regarded as having waived objections to the capacity of the plaintiff. This was the only point in the case which was argued for the defendant by Mr. Derby, who represented Messrs. Kinney, McClanahan & Cooper.

There remain twenty-five exceptions none of which can be sustained. Exception 1 was not argued; 3 and 4 were waived; 2, 6, 7, 8, 10, 11, 12 and 13, to excluding or striking out evidence which afterwards went in are overruled because no harm was done; 9, to ruling out evidence of a foreclosure affidavit, 14, to ruling out what the widow said when Kalua went to the house, and 16, to ruling out Kapakahi's mortgage, are overruled because the evidence was immaterial to the issue; 17, 18, 19, 20 and 21, relating to attempts to prove that a certain person was an officer of the Fruit Company for which Kalua appears to have sold to Decoto, and to letters in 1899 and 1900, demanding possession, do not require discussion. Exceptions 22 to 26, to the court allowing the plaintiff in rebuttal to recall a witness to testify where she got taro after the widow went to Molokai and while she was living with the child, and also to allowing evidence of another witness upon the same subject, are not sustained. The evidence tended to show that Kalua alone was not then using the land. To the further evidence in rebuttal that the witness never saw the Rev. Pali on the premises between Kapakahi's death and the widow going to Molokai, the defendant's objection that this was negative testimony, having no bearing on the case, is certainly tenable, but neither does the exception have any bearing on the case.

We cannot fail to observe that during the minority of the infant the statute of limitations could not have begun to run. If she died under age the defendant could not have acquired a prescriptive title until ten years thereafter, and if she lived to become of age; not until five years thereafter. As it does not appear how old the child was at her father's death or at what time she died, it is impossible to say whether time enough elapsed between her death and February 6, 1901, the date of

filing action, to enable a prescriptive title to be acquired. The exceptions, most of which appear to be frivolous, are overruled.

J. Lightfoot, J. A. Magoon with him on the brief, for plaintiff.

D. H. Case, with whom *J. L. Coke* and *A. H. Crook* were on the brief, and *S. H. Derby* for defendant.

IN RE ASSESSMENT OF TAXES OAHU RAILWAY &
LAND COMPANY.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

ARGUED NOVEMBER 7, 1905. DECIDED NOVEMBER 13, 1905.

HARTWELL AND WILDER, JJ., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF FREAR, C. J.

TAXATION—*separate interest as between lessor and lessee.*

The O. R. & L. Co. leased a large tract of land from the Campbell estate and subleased a portion of same to the E. P. Co., Ltd. The Campbell estate was assessed for its interest in the lease to the O. R. & L. Co., the E. P. Co., Ltd., was assessed as an enterprise for profit which included its interest in the sublease, and the O. R. & L. Co. was assessed for its interest in the sublease. Held: That each interest was assessed according to law and that the assessment of the O. R. & L. Co.'s interest in the sublease to the E. P. Co., Ltd., was not illegal and void and was not in violation of the 14th amendment of the U. S. Constitution. *In re Assessment of Taxes of O. R. & L. Co.*, 16 Haw. 564, affirmed.

Id.—*valuation.*

An assessment of \$300,000 on the interest of the O. R. & L. Co. in the sublease to the E. P. Co., Ltd., is sustained.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by the Oahu Railway & Land Company from a decision of the tax appeal court for Oahu sustaining an

assessment of \$300,000 on the interest of the appellant in a certain lease to Ewa Plantation Co., Ltd.

In 1889 James Campbell leased for fifty years to B. F. Dillingham about 40,000 acres of land on Oahu, which lease Dillingham assigned to the Oahu Railway & Land Company. That company subleased to W. R. Castle 7860 acres of the land and Castle assigned this sub-lease to the Ewa Plantation Co., Ltd., which is required to pay to the Oahu Railway & Land Company 4 per cent. of its annual product of sugar by way of rental. The sublease retains in the Oahu Railway & Land Company the final month of the 50 year term. The interest of the Oahu Railway & Land Company was returned as of no value and was assessed at \$300,000, which assessment was sustained by the tax appeal court.

An assessment of \$240,000 against this same interest of the same taxpayer for the year 1904 was sustained by this court in 16 Haw. 564. Counsel state in their brief that "it does distinctly appear that the court failed to apprehend or consider our point made that the assessment was void since 'the property in question is a separate item and should be separately assessed' ", but this is not true, as the decision clearly shows that that point was apprehended and considered. All contentions that are now made by the taxpayer, except as to the increase of \$60,000, were made, considered, passed upon and decided by this court in that case adversely to the taxpayer. Counsel for the taxpayer now claim and were permitted to argue that the decision referred to is erroneous in holding that the assessment was not illegal and void and not contrary to the 14th amendment of the Constitution of the United States.

The contention of the taxpayer, as we understand it, is that the interest of the Campbell estate (the successor to James Campbell), of the Ewa Plantation Co., Ltd., and of itself in the 7860 acres held by Ewa Plantation in the sublease above referred to must be assessed separately, that is, valued separately; that this valuation must be made and entered upon the assessment book; that the provision is for the benefit of the tax-

payer in order that it may compare its assessment with the assessment of those holding other interests in the property so that it should not be overassessed; and that "it is a violation of the 14th amendment of the Constitution of the United States, both as depriving it of its property without due process of law and denying it the equal protection of the laws, if its property is assessed separately without the whole item being valued, and it being determined whether it is paying only its tax and not that of the other interests of the land."

Section 1216 of the Revised Laws provides that "All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value," provided that property combined and made the basis of an enterprise for profit shall be assessed as a whole on its fair and reasonable aggregate value.

Section 1217 of the Revised Laws provides that "The interest of every person in any property shall be separately assessed, and every person shall be liable to taxation in respect of the full value of his interest in such property."

A taxpayer cannot complain if he is properly assessed irrespective of whether some one else is properly assessed or not. See *Inter Island Steam Navigation Company v. Shaw*, 10 Haw. 640, where the court said: "The main question in this case was whether the assessment of the plaintiff's property was correct, and, if it could be proved that the assessor did not follow the same course in all cases, this would not show that he did not follow the right course in this, or that he did not follow the right course in other cases, much less that he was guilty of fraudulent discrimination." But, in our opinion, the interest of each taxpayer, that is, the Campbell estate, the Ewa Plantation Co., Ltd., and the Oahu Railway & Land Company, was properly and legally assessed. The Campbell estate was separately assessed, as the statute provides, for its interest in the lease to Dillingham. Because the lessee subleased portions of the land is no concern of the lessor so far as his (the lessor's) right to be assessed separately for his interest is concerned. The

lessor's liability to pay taxes and right to be assessed separately for his interest remains the same whether portions of the land are subleased or not. The Oahu Railway & Land Company was also separately assessed, as the statute provides, for its interest in the sublease to the Ewa Plantation Co., Ltd. In ascertaining the value of this interest many circumstances may properly be considered. This court said on that point in *Oahu Railway & Land Company v. Shaw*, 10 Haw, 645, "But the value of a leasehold depends upon many circumstances, as the amount of rent reserved by the lease, the privileges, covenants and conditions in the indenture, the location of the land, the uses to which it can be put, the population in the locality, the prospects for further development of its resources, and we might add, all other considerations economic or political which affect values in general." But it is not necessary that those facts and circumstances appear on the assessment book. The Ewa Plantation Co., Ltd., was also properly assessed for its interest in the 7860 acres of land subleased from the Oahu Railway & Land Company by including it in the combined property forming the basis of an enterprise for profit. See *Inter Island Steam Navigation Company v. Shaw*, 10 Haw. 624.

Thus in each case the interest of each taxpayer was separately assessed as provided by law. It is not necessary that the method by which the full cash value of a piece of property is arrived at should appear on the assessment book. As long as his property is not assessed for more than its full cash value what complaint has the taxpayer? If it is assessed for more than its full cash value, he has his remedy, whether the method by which that result is reached appears on the assessment book or not. Consequently the taxpayer is not deprived of its property without due process of law, nor is it deprived of the equal protection of the laws.

The cases cited in the brief for the taxpayer do not conflict with the foregoing views, and it is unnecessary to review them. But, as *Brown v. Smith*, 8 Haw. 677, was particularly relied on, we will refer to that case. It was there held that a cove-

nant of a tenant to pay the taxes does not affect the landlord's liability to pay them, and that a guardian is not liable for taxes assessed to his ward's estate, or for taxes assessed upon the ward's interest in a lump sum with the interest of other tenants in common, the statute requiring the assessment to be to the guardian and upon each interest separately, and that an assessor and collector of taxes has no authority to collect taxes assessed by his predecessor in a former year unless such authority is given by statute. That case does not in the slightest degree conflict with any views set forth herein.

That portion of the 14th amendment to the Constitution of the United States which appellant claims is violated reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This "nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which endangers them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Civil Rights Cases*, 109 U. S. 11. But, as already pointed out, appellant has not been deprived of any property without due process of law and has not been denied the equal protection of the laws.

It is further claimed by the taxpayer that in any event the assessment should not be more than \$240,000, which was the assessment for last year. While agreeing that valuations should not be changed from year to year for slight reasons (See *Tax Assessment Appeals*, 11 Haw. 237) still the decision of the tax appeal court is entitled to some weight and the burden is on the appellant to show that it is erroneous. *Lihue Plantation Company v. Farley*, 13 Haw. 283; *In re Assessment of Taxes, Estate of Bernice P. Bishop*, 13 Haw. 671. In this case the evidence shows that the gross amount received by the appellant in 1904 from the Ewa Plantation under this sublease was \$80,506.16,

being a little over \$4,000 more than for the year 1903 and that the annual average gross amount received by the appellant under this sublease for the past five years was \$76,273.91. The assessor estimates that the net amount received by the appellant under the sublease is over \$50,000 a year. In our opinion the appellant has not shown that the decision of the tax appeal court was erroneous.

The decision of the tax appeal court sustaining an assessment of \$300,000 is affirmed.

Castle & Withington for the taxpayer.

M. F. Prosser, deputy attorney general, for the assessor.

IN THE MATTER OF THE APPLICATION OF WONG
LUNG FOR A WRIT OF HABEAS CORPUS.

ORIGINAL.

ARGUED NOVEMBER 22, 1905. DECIDED NOVEMBER 22, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

INFAMOUS PUNISHMENT—*unlawfully imposed by jailer on misdemeanant.*

Compelling a prisoner to go through the public streets and labor on the public parks in public view in jail uniform, though not striped, is infamous punishment, and cannot lawfully be imposed on one convicted of a misdemeanor, even on the pretense that it is for the health as distinguished from the punishment of the prisoner; but the fact that such misdemeanor when held under a lawful sentence is subjected to such punishment by the jailer, without authority of law, does not entitle him to a discharge on habeas corpus, at least when the unlawful punishment was inflicted only for a brief period and had ceased sometime prior to the application for the writ.

ORAL OPINIONS.

This was an application for a writ of habeas corpus for the

discharge of the applicant, who was serving a term of six months' imprisonment in Honolulu jail under a sentence of the district magistrate of Honolulu for having received stolen goods. The ground relied on for the prisoner's discharge was that the high sheriff as custodian of the prisoner in such jail inflicted upon him infamous punishment by compelling him, clothed in convict garb, to perform hard labor in said Honolulu before the public eye, and to pass along the public highways in going to and from such hard labor. The respondent admitted that the prisoner was required to pass through the public streets of Honolulu and to work upon a public park in public view in the unstriped uniform of the inmates of such jail. The defense was that under the rules of the prison inspectors the high sheriff might, upon the recommendation of the prison physician, for the maintenance of the good health of the prisoners, compel them under supervision of guards to perform manual labor at such places and under such conditions and at such times as may seem best for the health of such prisoners; that the prisoner in question was subjected to the treatment complained of for the benefit of his health in accordance with the said rule for a period of five days as alleged in the petition for the writ, ending several days prior to the filing of the petition; that the labor complained of was not hard labor under the circumstances; that such labor and also exposure to public view in a uniform not striped and therefore, as contended, not in convict garb, was not infamous punishment; and that the word "labor" in section 2 of act 58 of the Laws of 1905, which provides that no prisoner confined in the Honolulu jail shall be subject or compelled to perform "labor" during the term of his imprisonment must be construed to mean "hard labor" when read in connection with the provisions of acts 33 and 59 passed at the same session.

FREAR, C. J. The court is of the opinion that the treatment of the prisoner by the high sheriff was of an infamous nature, that is, that it is infamous punishment to take one sentenced for the commission of a misdemeanor, imprisoned in Honolulu jail, through the public streets in a uniform—the uniform used

in that jail—and compel him to work on the public parks of the city in the public view, but the court is of the opinion that that does not necessarily entitle the prisoner to his discharge. It is not disputed that the prisoner is imprisoned lawfully—under a valid law—under a lawful sentence; and the high sheriff, the respondent, is entitled to retain him under that sentence in Honolulu jail. The fact that the jailer, the respondent, has inflicted a punishment or a wrong upon the prisoner which he was not by law authorized to inflict does not entitle the prisoner to his discharge, at least, when, as in the present case, it appears that that unlawful punishment or that wrong, was imposed upon him at a time prior to the bringing of this petition—some days prior I believe.

Accordingly, the order of the court is that the prisoner be and he is remanded to the custody of the high sheriff.

HARTWELL, J. As to what constitutes infamous punishment, there are many different things, not merely hard labor as the attorney general has said. Being found in company with felons is per se an infamy. Hard labor is not per se infamous. On the contrary it is highly honorable in the opinion of a great many people including myself. It is the compulsory association with felons, or the compulsory hard labor in the public eye which tends to produce infamy. I would not say that compulsory hard labor away from the public gaze is infamous by any means, but bringing one before the public dressed in garb that shows that he is a convict,—whether his hair is cropped or not,—so that every one understands that he is placed at the hard labor usually imposed upon convicted felons.

L. M. Straus for petitioner.

E. C. Peters, Attorney General, for respondent.

MARY CHARMAN, LYDIA MILLER, HENRY CHARMAN, PRISCILLA CHARMAN, FRED MILLER, GEORGE CHARMAN, MOSES MILLER, MARGARET MILLER, WILLIAM CHARMAN, JR., AND JAMES CHARMAN v. WILLIAM CHARMAN.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

SUBMITTED NOVEMBER 13, 1905. DECIDED NOVEMBER 23, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EQUITY—*quieting title.*

Equity has no jurisdiction to quiet title by removing a cloud where there is no cloud alleged.

Id.

In a suit in equity to quiet title to land where the bill shows that defendant had an interest in the land in common with the plaintiffs and the answer denies that plaintiffs have any title, a decree based on the pleadings without any evidence having been taken that plaintiffs are the owners of the land and that defendant has no estate, right, title or interest in the land cannot be sustained.

OPINION OF THE COURT BY WILDER, J.

This is a suit in equity to quiet title. Plaintiffs' amended bill of complaint alleges: "That they are the devisees under the last will of George Charman, deceased, who died at Koloa, on the Island of Kauai, on the 2d day of January, 1892; that the said George Charman during his life time and the plaintiffs above named as devisees since the time of his death have been and are the owners and in the actual possession" of a certain piece of land on Kauai; "that the said defendant claims an interest or interests therein adverse to the plaintiffs, and that the claim

of the said defendant is without any right whatever, and that the defendant has not any estate, right, title or interest whatever in said lands or premises or any part thereof except as one of the devisees under the will of George Charman, deceased; that said defendant claims that he is owner of the above described premises in fee simple and is entitled to the possession thereof by reason of which said claim said premises have been damaged and the above named plaintiffs have been and are unable to dispose of or lease the said premises to advantage." The prayers are "that the said defendant may be required to set forth the nature of his claim and that such adverse claim of the said defendant may be determined by a decree of this court and that by said decree it be declared and adjudged that said plaintiffs are the owners of the said premises, and that this defendant has no right, title or interest therein, except as one of the devisees under the will of George Charman, deceased, and also that the said defendant and those claiming under him, his agent or servants, be forever debarred from asserting any claims whatever in and to said lands and premises adverse to the plaintiffs." The answer of the defendant sets forth that: "This defendant denies that plaintiffs are the owners as devisees under the will of George Charman, deceased, to the land described in said bill—for that during the life time and since the death of George Charman, was not or had any title to said land to devise all or any portion of the said land described in said bill; that said land described in plaintiffs' bill belongs to one W. Likeke now deceased, that he had during his life time mortgaged the same to one C. R. Bishop dated 22d day of July, 1869, and from said C. R. Bishop assigned over to said George Charman, deceased, on, to wit, the 15th day of September, 1874, which said mortgage is of record, not being fully paid or cancelled to the present day; that said George Charman, deceased, during his life time had collected the rents and profits from said land as mortgagee to liquidate the mortgage and debt on said land, and that since his decease his devisees are collecting the rents and profits from said land described in said bill."

The circuit judge found in favor of plaintiffs upon the pleadings without taking any evidence, and decreed that plaintiffs are the owners of the premises and entitled to the possession and that defendant has not any estate, right, title or interest therein, and that defendant be barred from asserting any claim to the said premises adverse to plaintiffs and from collecting rents therefrom or in any manner interfering with the occupation of same by plaintiffs. The defendant appealed.

The jurisdiction of equity to give relief in matters of quieting title is either by a bill of peace, which generally lies only in favor of a person in possession who has already established his title by one or more successful contests at law, or by a bill to remove a cloud, which is to procure the cancelation, delivery up or release of an instrument, incumbrance or claim constituting a cloud on the plaintiff's title which could be used to injure or vex the plaintiff in the enjoyment of his title. See *Holland v. Challen*, 110 U. S. 15; 3 Pomeroy, Equity Jurisprudence, Sec. 1398. This is a suit brought apparently to remove a cloud, but under the allegations of the amended bill there is no cloud for equity to remove. See *Harms v. Kranz*, 167 Ill. 421. Irrespective of this, however, the decree cannot be sustained.

The circuit judge found in favor of the plaintiffs on the pleadings without taking any evidence. This was done apparently on the theory that defendant by his answer had disclaimed ownership in the land. However the answer may be regarded, it denies the title of plaintiffs, and, therefore, plaintiffs should have proved their title to the land before being decreed to be the owners. And the amended bill shows that defendant has an interest in the land in common with the plaintiffs. How then can it be held from the pleadings that defendant has no estate, right, title or interest in the land?

The decree appealed from is reversed and the cause is remanded to the circuit judge of the fifth circuit.

M. F. Prosser for plaintiffs.

No appearance for defendant.

TERRITORY OF HAWAII EX REL. COUNTY OF OAHU
v. WILLIAM L. WHITNEY, DISTRICT MAGIS-
TRATE OF HONOLULU, ISLAND OF OAHU.

ORIGINAL.

ARGUED NOVEMBER 8, 1905. DECIDED NOVEMBER 24, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ORDINANCES—legislature may delegate to county supervisors power to make.

The legislature may delegate to county boards of supervisors power to make police ordinances of a local nature, such as ordinances relating to gambling.

Id.—construction of statute authorizing.

Under an act authorizing county boards of supervisors "to regulate by ordinance * * * local police * * * and other regulations * * * and affix a penalty for the violation of such ordinances," held: "regulate" should be construed as "make"; the act authorizes county boards of supervisors but not the people of a county to make ordinances against gambling, but not to impose imprisonment as a penalty, nor to make a violation a misdemeanor, nor to confer jurisdiction on district magistrates.

Id.—enacting clause.

An ordinance need not contain an enacting clause; it may be valid if in fact made by the board of supervisors though purporting in its enacting clause to have been made by the people of a county.

Id.—prosecutions under, are criminal in nature.

Prosecutions for violations of county ordinances are criminal rather than civil in their nature, as shown by various provisions of the county act.

Id.—jurisdiction of offenses against.

In the absence of statutory provision as to what courts shall have jurisdiction of offenses against county ordinances, the appropriate Territorial courts have jurisdiction according to the gen-

eral laws defining their jurisdiction over offenses against the Territorial laws. The provision of the county act that the county attorney shall be the public prosecutor for the county and attend the circuit court in and for the county and conduct all prosecutions therein for offenses against the laws of the Territory and the ordinances of the board of supervisors of the county, is held, especially in view of other provisions, not to give circuit courts exclusive jurisdiction of offenses against ordinances.

ED.—prosecution for offenses against, should be in name of Territory.

Prosecutions for offenses against county ordinances should be in the name of the Territory.

MANDAMUS—requiring magistrate to take jurisdiction.

The district magistrate having declined to take jurisdiction of a complaint for a violation of a county ordinance, and being held to have such jurisdiction, is required to take jurisdiction, but is not required to act in a particular manner.

OPINION OF THE COURT BY FREAR, C.J.

This is an application for a writ of mandamus to compel the respondent as district magistrate of Honolulu, one of the judicial districts within the county of Oahu, to issue a warrant for the arrest of each of five named persons upon a sworn complaint charging them with a violation of an ordinance made by the board of supervisors of the county of Oahu prohibiting the exposure of gambling implements in a room barred so as to make it difficult of access when three or more persons are present, or the visiting of such a room so barred under such circumstances, and to take jurisdiction of such a charge,—the said respondent having refused to issue such warrant or take such jurisdiction solely on the ground that he had no jurisdiction over the subject matter of any ordinances made by said board of supervisors.

The question that presents itself first is whether it is in the power of the legislature to authorize county boards of supervisors to make ordinances of the kind in question. There can be no doubt that such authority may be conferred upon cities and other municipal corporations proper. It is conceded for the purposes of this case by counsel for the respondent that such

authority may be delegated to counties also, which are generally classed as quasi municipal corporations. This, however, is by no means clear.

It is not usual to give such power to counties. In a number of states in which it has been given, it has been under express constitutional provisions. See *County of Los Angeles v. Eickenberry*, 131 Cal. 461; *State v. Forest County*, 74 Wis. 610; *People v. Baker*, 29 Barb. 81; *Feeck v. Township Board*, 82 Mich. 399; *Board of Commissioners v. Abbott*, 52 Kan. 148 (34 Pac. 416). In some states the constitution grants the power directly, in others it authorizes the legislature to grant it. In either case, however, the fact that the grant is made or authorized by the constitution does not necessarily show that it could not be made by the legislature in the absence of express constitutional authorization. This is apparent when, as is the case in some states, the constitutional provision covers not only counties but also cities and other municipal corporations proper, as to which there can be no doubt of the power of the legislature irrespective of express constitutional authorization. So, when the constitutional provision itself makes the grant, it may be explained on the theory that it was deemed best not to leave discretion in the legislature to withhold the grant. In other cases the constitutional provision may have been inserted out of abundant caution. There is room for argument that such authority, in the nature of constitutional authority, is implied from the language of Section 56 of the Organic Act, which authorizes the Territorial legislature to "provide for the government" of, as well as "create counties and town and city municipalities." We will proceed, however, as if the words first quoted from this section did not add in this respect to the powers of the legislature implied from the words last quoted.

Counties doubtless have not inherent or implied power, as municipal corporations proper have, to make by-laws, but even in the case of municipal corporations proper the power to make police ordinances of the kind in question, as distinguished from mere by-laws relating to the internal management of the corpor-

ation itself, is held to be an additional power—to be conferred by express or implied grant, and not implied from the mere character of the municipal body as a corporation proper. *Commonwealth v. Bennett*, 108 Mass. 27; *Paul v. Gloucester Co.*, 50 N. J. L. 585, 600; *Commonwealth v. Turner*, 1 Cush. 493.

No case has come to our attention which holds that the legislature may not without express constitutional authorization empower a county to make ordinances. The difficulty arises not so much from decisions against the proposition as from lack of decisions in support of it and the uncertainty as to the precise reasoning upon which the question should be decided. There are indeed general expressions in both text books and decisions to the effect that power to make ordinances may be delegated to "other municipal corporations" or "quasi corporations" as well as to cities and towns, and also decisions that seem to take it for granted that such power may be so conferred. See *Ingersoll*, Pub. Corp., Sec. 19; *McQuillin*, Mun. Ord., Secs. 38, 90; *Commonwealth v. Turner*, 1 Cush. 493; *State v. Noyes*, 30 N. H. 279; *Haigh v. Bell*, 41 W. Va. 19 (31 L. R. A. 131; *For-syth v. City of Hammond*, 71 Fed. 443. For instance, in *Dunn v. Wilcox Co.*, 85 Ala. 144 (4 So. 661), the court, referring to a particular provision in the constitution, said: "It was not intended to prohibit the delegation to counties of the quasi legislative powers commonly exercised by them as government or auxiliary agents of the state, and for local purposes. * * * This would defeat, rather than promote, that peculiarly American feature of Republican government, which is one of decentralization, 'the primary and vital idea of which is that local affairs shall be managed by local authorities.'"

This brings us to the question of the principles upon which the question should be solved. It is a fundamental rule that delegated power cannot be delegated. This applies to legislatures as well as to other bodies. Legislative power delegated to legislatures cannot be delegated to other persons or bodies. There is, however, an exception to this maxim as well established as the maxim itself. This exception arises by implica-

tion from the immemorial practice which has recognized the propriety of vesting in municipal organizations certain powers of local regulation over matters in which the persons within such organizations are especially interested and in regard to which they are supposed to be especially competent to judge. Cooley, *Const. Lim.*, 7th Ed., 156, 264; 1 Dillon, *Mun. Corp.*, Sec. 308; *State v. Carpenter*, 60 Conn. 97. The implication is that in delegating to legislatures the legislative power the people could not have intended to prevent the further delegation by the legislatures of certain police and other powers of a local nature which had always been exercised by municipal corporations and the exercise of which by the local communities acting through such corporations has been regarded as one of the fundamental features of the American and English systems of government. The question is, how far does this exception extend? Does it extend to quasi corporations such as counties, which usually have not exercised such powers, as well as to corporations proper such as cities, which usually have exercised such powers? The only case so far as we are aware in which this question is directly or adequately considered is that of *Paul v. Gloucester County*, supra. One of the questions in that case was whether a provision in a liquor act that the act should operate or not in any particular county according to a vote of the majority of the legal voters in such county, was valid. The court, fifteen judges sitting, held, eight to seven, that it was valid. Lengthy and powerful opinions were given on each side. Several questions were discussed more or less related to the question now before us besides the particular question now presented. Among these was that of the contingent theory of legislation, under which legislation is held permissible if it is complete in praesenti though not to take effect except upon the happening of a future event the determination as to the happening of which is left to some other body than the legislature; but if the contingent event is to be the vote of the people of the state, the legislation is not permissible, for that would in effect be to delegate to the people the very question,

namely, that of the expediency of the law, upon which the legislature itself should pass. Another question discussed was whether the legislature could properly provide that the act should or should not take effect in any particular locality according to the vote of the people in that locality. This is substantially the question whether the legislature may delegate to the people of a particular locality such powers of legislation as it may delegate to municipal corporations proper under the well established exception above referred to, for it would seem that if the legislature may delegate the power to make ordinances of a local nature to the people of a particular locality it may also delegate to the same people the power to decide whether the law enacted by the legislature itself should operate in that locality. Upon this question courts are divided. For cases holding that legislative power may be so delegated, see *McQuillin, Mun. Ord., Sec. 426*. The majority and minority opinions then proceeded to discuss the question whether the delegation of such authority was valid if the locality, to the people of which the vote was referred, was a county, that is, an established quasi municipal corporation. The majority of the court apparently proceeded on the theory that the delegation was practically to the county, and undertook at considerable length to show that the power to delegate depended not upon the name or extent or character of the political subdivision of the state to which the power was delegated but upon the character of the grant. If the grant was of a power to enact general legislation it was void, but if it was restricted to such powers, in the nature of police powers, as were necessary to local government, it was valid. The minority took the view that the delegation of power in that instance was not to the county but to the people within a certain area, and that it was immaterial that such area happened to be a county. It did not doubt the ability of the legislature to create municipal corporations or to invest the people within any territorial limits, whether the limits were coincident with those of a county or not, with corporate functions, or to confer upon such corporate organizations the right to exercise

police power, including the entire control and regulation of the sale of spirituous and malt liquors, but it denied that a mere attempted grant of legislative power to the people within a certain area would invest such people with corporate functions. It did not deny the authority of the legislature to confer police power upon a county possessing corporate functions, although it pointed out the ordinary distinction between the functions of a county organized to assist in the administration of the general laws of the state and a municipal corporation proper organized for local and police purposes. The majority opinion was followed without dissent by the court, eleven judges sitting, in *Noonan v. County of Hudson*, 52 N. J. L. 398, under an act authorizing county boards to construct public roads through counties and to submit the question whether such roads should be constructed to the electors of the counties.

The county act now in question provides, in subdivisions 1 and 8 of Section 9 (Laws of 1905, Act 39), "that each county shall be a body corporate and politic" and is subject to "sue and be sued in its corporate name." It confers upon counties various corporate functions. The act as a whole was passed for the purpose of establishing, as far as it went, local government, although theoretically the counties established by the act may properly be considered as quasi corporations rather than municipal corporations proper. The act also confers upon the boards of supervisors certain legislative powers other than that now in question, as, for instance, (Sec. 62, Subd. 1), "to fix the salaries of all county officers, not herein otherwise provided for." This is a delegation of power which is generally held valid elsewhere except when expressly prohibited by constitutional provision.

The case of a territory of the United States is somewhat analogous. The rule that delegated power cannot be delegated applies to Congress as well as other legislative bodies, as has been held repeatedly. Territories, moreover, are not municipal corporations proper, but, as was said in *National Bank v. County of Yorktown*, 101 U. S. 129, "their relation to the gen-

eral government is much the same as that which counties bear to the respective states," and yet it cannot be doubted that Congress may delegate legislative powers to territories. See also *Coffield v. Territory*, 13 Haw. 478.

On the whole we are of the opinion that the legislature could delegate to the county boards of supervisors power to make ordinances relating to certain matters of local concern.

Power has been conferred expressly by the county act (Sec. 62, Subd. 5) upon the board of supervisors of each county,

"5. To regulate by ordinance within the limits of the county, all local police, sanitary and other regulations not in conflict with the general laws of the Territory, or rules and regulations of the Territorial board of health, and fix a penalty for the violation of such ordinances."

This is sufficient authority for the enactment of an ordinance of the kind in question. Gambling is one of the subjects as to which power to make ordinances may be delegated. See *State v. Carpenter*, supra.

The language of this authority is open to criticism, for in terms it is an authority to "regulate * * * regulations," which, construed strictly, would not make good sense and would apply only to regulations already in existence, but the intention is so clear that we may well construe "regulate" as "make." See *Shillaber v. Waldo*, 1 Haw. 40; *Republic v. Waibel*, 11 *Id.* 226; *Hall & Son v. Dickey*, 15 *Id.* 593; *Mankichi v. Hawaii*, 190 U. S. 197.

Moreover, we do not understand that this statutory provision authorizes the board of supervisors to impose imprisonment as a penalty, although as to that we are not required to decide, for the ordinance, which imposes a fine not exceeding \$500 or imprisonment for not more than six months or both, may stand even if the part relating to imprisonment is void. Of course the penalty, whatever its character, should be reasonable in amount, and it is usual for statutes to specify both the character and the maximum amount that may be prescribed by the ordinance. This statute does not specify either. It is generally

held that penalties, such as imprisonment and forfeiture, other than pecuniary cannot be prescribed in the absence of express statutory authority (See McQuillin, Mun. Ord., Sec. 173; 1 Dillon, Mun. Corp., Secs. 336-338, 408-410; 1 Smith, Mun. Corp., Secs. 546, 550; Ingersoll, Pub. Corp., Sec. 76), although it is held in some cases at least that power expressly conferred to enforce ordinances or pecuniary penalties imposed under ordinances includes power to imprison, not as a punishment, but as a means of enforcing payment of such penalties when imposed. *Ex parte Green*, 94 Cal. 397; *Natal v. Louisiana*, 139 U. S. 621.

The enacting clause of the ordinance also is invalid. It reads: "The people of the county of Oahu do ordain as follows:" The power to make ordinances is conferred upon the board of supervisors and not upon the people of the county. But this does not invalidate the ordinance, for it did not have to contain any enacting clause, and the petition and return show that it was in fact made by the board of supervisors.

The next question is whether the proceeding to enforce the ordinance is civil or criminal and within the jurisdiction of a district magistrate. The respondent contends that the proceeding is civil, that the county act does not confer jurisdiction of cases under county ordinances upon district courts, that the jurisdiction of such courts, of inferior and limited jurisdiction, should be strictly construed and that the board of supervisors could not either create a court or confer jurisdiction upon one or make an act a misdemeanor. The ordinance in question purports to make a violation of it a misdemeanor and to confer jurisdiction of offenses arising under it upon all district magistrates within the county. We will assume that these portions of the ordinance are void or surplusage, as they doubtless are. The question is whether a violation of the ordinance is a criminal offense and whether jurisdiction over it has been conferred upon the respondent, not by the ordinance itself, but by the laws of the Territory, including the county act. Whether violations of municipal ordinances are of a criminal or civil nature

is a question upon which the courts are 'very much divided. Some courts hold that they are criminal; others, that they are civil; others, that they are civil or criminal according to their nature, and still others, that although they are civil the procedure should be stricter than in ordinary civil cases. See Ingersoll, Pub. Corp., Sec. 77; 1 Dillon, Mun. Corp., Sec. 411; 1 Smith, Mun. Corp., Sec. 554; McQuillin, Mun. Ord., Sec. 304; 15 Enc. Pl. & Pr. 412 et seq. Whether they should be regarded as civil or criminal depends much upon the language of the statute taken as a whole and to some extent upon the nature of the act charged. So far as its nature is concerned, the act in the present case would naturally be the subject of a criminal statute. If in addition to this the language of the provision already quoted is not sufficient—from the natural meaning of the word penalty and the nature of the subjects in regard to which ordinances may be made—we think that there is sufficient in the first subdivision of section 90 of the county act, which provides that,

“The county attorney is the *public prosecutor* for the county in which he shall have been elected and he, or his deputy shall:

“1. Attend the circuit court in and for said county and conduct *on behalf of the people all prosecutions* therein for offenses against the laws of the Territory of Hawaii and the ordinances of the board of supervisors of the county.”

This shows an intention on the part of the legislature that at least some violations of some ordinances of boards of supervisors were to be offenses to be prosecuted as such by the public prosecutor and on behalf of the people, in other words, that they were to be considered criminal or public offenses. If any such violations are to be regarded as such offenses, those now in question are certainly among them. Moreover, offenses against ordinances are classed with offenses against laws, as if both were of the same character.

If, as we hold, the violation of this ordinance is a criminal offense it would be within the jurisdiction of a district magistrate under Sec. 1664 of the Revised Laws, which provides that

such magistrates shall have jurisdiction of "criminal offenses punishable by fine or by imprisonment not exceeding one year * * * whether with or without fine." The county act having made no provision for local or special courts to try cases arising under county ordinances the implication is that, to avoid the absurdity of rendering all such ordinances nugatory, such cases were intended to be tried by the appropriate Territorial courts. Ingersoll, Pub. Corp., Sec. 77, p. 252; 1 Smith, Mun. Corp., Sec. 548, note 386; 1 Dillon, Mun. Corp., Sec. 409, note 3, the two authors last mentioned citing *Columbia v. Harrison*, 2 Const. (S. C.), 213. As between the circuit and district courts of the Territory, the case now in question would naturally fall within the jurisdiction of the latter.

It is suggested, however, that the first subdivision of section 90 of the county act above quoted gives exclusive jurisdiction under county ordinances to the circuit courts. Subdivision 3 of the same section has some bearing upon this question. It reads thus:

"3. Institute proceedings or direct the sheriff or deputies to do so before the magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that any such offenses have been committed; and for that purpose take general charge of criminal cases in the district courts either in person or by the sheriff, deputy sheriff or such other prosecuting officer as he shall appoint; attend upon the magistrates in case of arrest; and attend before and give advice to the grand jury whenever cases are presented to them for their consideration; provided, however, that nothing herein contained shall prevent the institution or conduct of proceedings by private counsel before magistrates under the direction of the county attorney."

Reading these subdivisions (1 and 3) together it is apparent that the circuit courts were not intended to have exclusive jurisdiction of offenses against ordinances. The fact that ordinances were mentioned in the first subdivision and not in the third would not show that the circuit courts were to have exclusive jurisdiction of offenses under them any more than the fact that the laws of the Territory were mentioned in the first sub-

division and not in the third would show that the circuit courts were to have exclusive jurisdiction of offenses under them. Such laws and such ordinances were mentioned once, namely, in the first subdivision, and were evidently intended to be implied in the subsequent subdivisions. The natural construction is that the circuit courts were intended to have jurisdiction, under both laws and ordinances, of such offenses as come within their jurisdiction under the laws defining such jurisdiction, and similarly as to district magistrates. The first subdivision does not purport to be a grant or definition of the jurisdiction of the circuit court, but is primarily a grant or definition as far as it goes of the powers and duties of the county attorney and his deputy. This accounts for the distinction between the first and third subdivisions so far as the present case is concerned and renders it unnecessary to account for such distinction on other grounds. The first subdivision was intended to apply to the county attorney and his deputy, while the third was intended to apply not only to those officers but to the sheriff and his deputies as well.

Apparently it was the intention to prosecute the case before the district magistrate in the name of the county. In our opinion it should be prosecuted in the name of the Territory.

Section 11 of the Organic Act provides that, "The style of all process in the Territorial courts shall hereafter run in the name of 'The Territory of Hawaii,' and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii." In *Brownville v. Cook*, 4 Neb. 101, it was held that a somewhat similar provision applied to prosecutions under ordinances as well as to those under state laws. But the correctness of this decision has been questioned (1 Dillon, Mun. Corp., Sec. 424, note 1) and several other courts have held that provisions of this kind do not apply to prosecutions under ordinances, so as to render void statutes or ordinances that provide expressly that such prosecutions shall be in the name of the municipality, although possibly the cases which so hold are distinguishable from the present case. See *Davenport v. Bird*,

35 Ia. 524; *Spokane v. Robinson*, 6 Wash. 547 (but see *State v. Fountain*, 14 Wash. 236); *Ex parte Boland*, 11 Tex. App. 159, and *Bautsch v. Galveston*, 27 Tex. App. 342 (11 S. W. 414), and similar rulings are said to have been made in Kansas, Kentucky and Mississippi. 15 Enc. Pl. & Pr. 421. In the present case there is no statute or ordinance that requires such prosecutions to be in the name of the county. In the absence of a constitutional provision or when such a provision is held not to apply it is often provided by statute or ordinance that such prosecutions shall be in the name of the municipality. Sometimes, however, it is expressly provided that they shall be in the name of the state or the people. *Goddard*, Petitioner, 16 Pick. 504; *Pillsbury v. Brown*, 47 Cal. 477; *State v. Robitsherk*, 60 Minn. 123. In many cases, apparently in the absence of any express provision on the subject, it seems to have been taken for granted that such prosecutions when considered criminal in their nature should be in the name of the State. *State v. Stearns*, 31 N. H. 106; *State v. Nelson*, 40 Vt. 455; *State v. Rowell*, 97 N. C. 417; *State v. Vail*, 57 Ia. 104; *Lynch v. Commonwealth*, 35 S. W. (Ky.) 264; *State v. Carpenter*, supra. Perhaps the language in *Snow v. U. S.*, 18 Wall. 317, 321, by analogy favors this view. In some cases it is held that such prosecutions should be in the name of the state, where the only statutory provision on the subject is of a general nature, to the effect that proceedings shall be the same as in other cases or that the general laws shall apply when not otherwise provided. *People v. Vinton*, 82 Mich. 39; *Vicksburg v. Briggs*, 85 Mich. 502. In *Sanata Barbara v. Sherman*, 61 Cal. 57, it was held that such prosecutions should be in the name of the people from the mere fact that they were criminal in their nature.

As we construe it, the county act in question contemplates that such prosecutions shall be in the name of the Territory rather than in the name of the county, and in view of the law as above set forth upon this general subject but little is required to show such an intention. Not only are violations of ordi-

nances of the kind now in question criminal offenses within the jurisdiction of district magistrates, as above held, which alone might be sufficient to show that the procedure in prosecutions for them should be the same as in other criminal cases before such magistrates in the absence of any provision to the contrary, but the first subdivision of Section 90 of the act above quoted states that such prosecutions shall be conducted "on behalf of the people," which naturally means the people of the Territory and not the people of the county, and must be construed, since it refers to laws as well as ordinances, to mean "on behalf of the Territory."

Under all the circumstances shown by the petition and return, which need not be set out in full, we are of the opinion that the district magistrate should not be required to take any particular action, but that he should be required to take jurisdiction of the case and, if necessary, a writ may issue requiring him to do so.

F. W. Milverton, Deputy County Attorney, for petitioner.

Respondent in person; W. T. Rawlins with him.

HARTWELL, J., CONCURRING.

The question of the power of the legislature to authorize counties as well as town and city municipalities "To regulate by ordinance within the limits of the county all local police, sanitary and other regulations not in conflict with the general laws of the Territory" involves consideration of important elementary principles. The maxim, *Delegata potestas non potest delegari*, that an "agent cannot lawfully nominate or appoint another to perform the subject matter of his agency" unless power of substitution is given, applies not only to transactions between principal and agent but to Congress and legislative bodies generally. Public attention is now directed to the question whether, assuming that Congress has constitutional power to enact laws regulating railway rates, it can delegate to an executive board the power to make rates from time to time, according to changing conditions.

In the present case the first thought which naturally suggests itself is whether the provision in the Organic Act "that the legislature may create counties and town and city municipalities * * * and provide for the government thereof" means that the legislature may provide for the government of counties by themselves within their county limits, as well as of town and city municipalities, in respect of "all local police, sanitary and other regulations not in conflict with the general laws of the Territory." Delegating certain legislative powers to municipal organizations, such as towns and cities, "has been found so essential to public welfare and its delegation has been so often sustained by judicial decision as to be established beyond question." Ingersoll, Pub. Corp., Sec. 116. Is there any valid reason why like powers may not be delegated to counties?

Grammatically the words "provide for the government thereof" may refer to counties as well as to town and city municipalities.

"It is true that, in strict grammatical construction, the relative ought to apply to the last antecedent; but there are numerous examples in the best writers to show, that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification. * * Suppose, for example, this phrase * * 'If there be any powers or provisions of an act of Parliament, of which the corporation are sole commissioners for executing,'—is it not obvious here that the relative 'which' refers to the 'powers and provisions,' and not to the 'act of Parliament?' " Abinger, C. B., *Staniland v. Hopkins*, 9 M. & W. 191.

It is not true that historically it is generally towns and cities rather than counties which have regulated their own affairs, although the powers of counties have more frequently been defined by general laws of the state, and restricted to administration of state laws, making them mere agencies of the state.

The student readily ascertains that the New England town is the administrative unit, as it is called, governed by its town meeting representing an intermediate stage between the municipi-

pal and public quasi corporation; and that "in the southern states the county is the unit of political organization and administration" and hence counties in those states "are charged with the supervision or performance of all functions of local government" and the same is true partially of the "amalgamated system" in the middle states. Ingersoll, Sec. 10; 1 Smith, Mun. Corp., Sec. 11. It would not be correct, therefore, to say with reference to the whole country that:

"A *municipal corporation proper* is created mainly for the interest, advantage and convenience of the locality and its people; a *county organization* is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, or military organization, of the means of travel and transport, and especially for the general administration of justice." 1 Dillon, Mun. Corp., Sec. 23, citing *Hamilton Co. v. Mighels*, 7 Oh. St., 109.

It would also be incorrect to confine legislative power to grant local government to towns and cities by reason of their inherent powers of self control, meaning powers which, when left free to do so, they have been used to exercising.

Delegating to towns and cities a restricted and limited power to govern themselves cannot be based upon the theory that the inhabitants of those corporate bodies are merely allowed to resume original powers in that regard.

Nor can any distinction be based upon the fact that counties are usually created solely by legislative enactment with topographical limits and without consulting the wishes of those who dwell within those limits while towns and cities are a growth and usually are voluntary corporations requiring for their incorporation the consent of the inhabitants. History shows that these organizations are formed or come into existence in various ways.

Moreover, if counties had always originated in one way and towns and cities in another, that fact would furnish no reason for restricting the power of local government to the latter. In any point of view then, I see no reason for excluding from

counties the power granted by the Organic Act to the legislature to authorize self government within the well defined limits of similar power when granted to town or city municipalities. The ordinance in the present case is clearly authorized by the County Act, with the exception that the authority given by the County Act to "fix a penalty for the violation of such ordinances" cannot be deemed to authorize imprisonment. The question is not presented whether the Organic Act authorizes the legislature to delegate to counties the power to prescribe the penalty of imprisonment for violation of county ordinances. Referring, however, to the intention of this provision in the County Act "unless the authority be plainly given it does not exist." 1 Dillon, Mun. Corp., 2 Ed., Sec. 287. "In England such a power cannot be conferred by the Crown and can only exist by authority of Parliament or a special custom." n 3, Ib.

It will be seen that the foregoing discussion assumes that providing a government for towns and cities means providing for their self government, the argument being that as counties are classed in the same sentence with town and cities the intention is to grant to them like powers, as far as by the nature of those organizations is practicable.

I fully concur in the opinion of the court and in the decision.

EDMUND B. McCLANAHAN *v.* RICHARD H. TRÉNT,
TREASURER OF THE COUNTY OF OAHU, AND
ANDREW ADAMS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 28, 1905. DECIDED NOVEMBER 29, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COUNTY ACT—*warrants on county treasurer issued to chairman of road board in payment of bills approved by board of supervisors.*

The board of supervisors of the county of Oahu having approved certain claims of certain laborers who had been employed in road work by the chairman of a road board, and who had given him their receipted bills in the form of a payroll, *held*: The auditor properly issued to him a warrant on the county treasurer for payment of the claims.

The county treasurer has no power to decline to pay a warrant issued by the county auditor upon a claim which has been legally examined, allowed and ordered paid by the board of supervisors.

OPINION OF THE COURT BY HARTWELL, J.

This was a taxpayer's bill brought to restrain the treasurer of the county of Oahu from paying a county warrant issued by the county auditor in favor of Andrew Adams in the sum of \$141, which warrant had been examined, allowed and ordered paid by the board of supervisors of the county, the plaintiff claiming that the warrant is unauthorized by law and its issuance to Adams unlawful as he is "not entitled thereto in payment of any claim or claims, demand or demands due to him from or chargeable against the said county of Oahu."

It appears from the answer that the board of supervisors of the county, having passed a resolution appropriating \$300 for running the Koolauloa road district during the month of August and the board's road committee, having, September 6, 1905, laid before the board a salary pay roll for \$141, which the committee approved and recommended to be paid as the same had been "certified to by Andrew Adams, Koolauloa district, that the services had been faithfully performed," the board adopted the report and allowed the demand.

The pay roll shows the names of seven persons—one described in the pay roll as a luna (overseer), the others as laborers, the pay roll showing the number of days that they had worked, the rate per day and the amount coming to each and also the statement: "We, the undersigned, hereby severally acknowledge that we have received from Andrew Adams the amount set opposite our respective names, same being wages in

full to date." The roll is underwritten "Expenditures authorized and approved by me. Andrew Adams, Chairman Koolauloa Road Board."

Any person having a claim against a county can, if he thinks fit to do so, assign the claim, his assignee then becoming entitled to collect the claim and, if necessary, sue for it in his own name; or the assignee may authorize an attorney to collect his claim either in the name of the attorney or of the claimant. There is nothing in the nature of county claims which requires a different treatment in these respects from claims against a private individual or corporation. The only risk the auditor takes is that the deed of assignment, or power of attorney, or receipts of the claimants are genuine. In this case the claimants had no other purpose in giving their receipts for their wages to the chairman of the road board than to enable him, as their attorney, to collect the money for them. It was immaterial to the county whether the warrant should be issued to the attorney Adams in his own name upon his surrendering the receipts to the auditor or in the names of the claimants, the latter course simply requiring an additional receipt by the claimants to be given to the treasurer, but certainly it was more convenient and a saving of time for the claimants that the warrants should be issued in Adams' name and we have no doubt that such was their intention. The board had no contractual relations with the laborers; it is possible that not a single supervisor could recognize any of them or that the auditor could identify any of them or would know their signatures. To require every laborer for the county to make out a bill for wages and take it in person to any of these officials would involve much unnecessary delay and trouble if not considerable expense to the laborers, whereas the chairman of the road board is personally known by the county officers and they feel justified in accepting his certificate that he authorized the payment of the money in accordance with the resolution of the board, and approved the bills, showing the number of days worked by each and the rate per day.

There was nothing illegal or contrary to any provision of the county act in the allowance of this claim by the board of supervisors or in the issuing of the warrant by the county auditor. The provision in section 75 of the county act, "The auditor shall issue warrants on the county treasurer in favor of persons entitled thereto in payment of claims and demands chargeable against the county, which have been legally examined, allowed and ordered paid by the board of supervisors," does not require that the warrants shall be made payable to the original claimants, but to the persons "entitled thereto," meaning entitled to the warrants. Such persons may be the original claimants, their assignees or attorneys. We are aware of no power which the treasurer himself has to decline to pay a warrant which has been "legally examined, allowed and ordered paid by the board of supervisors," as the law does not constitute him an authority to scrutinize the acts of the board and to pay or refuse to pay warrants in payment of claims passed by the board according, as in his opinion, the action of the board was legal or illegal. The only way in which payment of an unauthorized, fraudulent or illegal claim can be prevented after a warrant has been issued by the auditor would be by an injunction of a court having jurisdiction of such matters; but no illegality, fraud or lack of authority appears in this case.

The decree of the circuit judge perpetually restraining respondent from paying the warrant in question is reversed and the bill is dismissed.

S. H. Derby for plaintiff.

W. A. Whiting for defendant.

JAMES LOVE *v.* JAMES LOVE, JR., ANNIE K. HART
AND THE HENRY WATERHOUSE TRUST COM-
PANY, LIMITED, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 28, 1905. DECIDED NOVEMBER 29, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

JUDGE NOT DISQUALIFIED—*having been nominally of counsel.*

A justice of this court is not disqualified to sit in a case by reason of having been counsel of record as a member of a partnership which had been retained in the case, he having taken no active part in the case nor advised upon the questions in issue, and there being no statutory provision disqualifying him by reason of having been of counsel.

ORAL OPINION.

When this case was called for argument, it was suggested that Mr. Justice Wilder might be disqualified by reason of having been nominally of counsel of record as a member of the firm of Robertson & Wilder, which had been retained by defendants prior to his appointment to the bench, although having been of counsel is not one of the grounds of disqualification set forth in section 84 of the Organic Act. Argument was heard upon this question, which was taken under consideration and decided the next day as follows:

FREAR, C.J. In the case of *Love v. Love*, in regard to the suggestion that was made yesterday as to the disqualification of Mr. Justice Wilder, the court is of the opinion that the mere fact that a member of the court has been of counsel, nominally, by reason of having been a member of a partnership which was

retained in the matter, does not disqualify him, he having taken no active part in the case and not having advised in regard to the questions involved in the case. This is in the absence of any statutory or constitutional provision upon the subject. As to whether a member of the court would be disqualified by reason of having been of counsel if he had taken an active part in the matter and advised the client in regard to the questions in issue, the court expresses no opinion.

Accordingly, the court holds that Mr. Justice Wilder is not disqualified in this case.

H. E. Highton for plaintiff.

A. G. M. Robertson for defendants.

AMERICAN-HAWAIIAN ENGINEERING & CONSTRUCTION CO. v. TERRITORY OF HAWAII.

ORIGINAL.

ARGUED DECEMBER 5, 1905. DECIDED DECEMBER 5, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EXTRAS—*when not ordered in writing as required by contract—modification of proposal not accepted.*

Under a contract providing that extras shall not be paid for unless ordered in writing, no recovery can be had for an extra even when ordered in writing, if the order was made on the claim that the extra work was required by the contract and on the condition that it should not be paid for as an extra, notwithstanding the reply of the contractor that the work would be done subject to the right to payment if there was such right, the proposed modification not having been accepted by the party making the order.

CONTRACTOR—*when not liable for wages of inspector employed by other party to contract.*

A contractor is not liable as for labor furnished to him, for the wages of an inspector voluntarily employed by the other party to

the contract for his own benefit even after the time when the contractor should have completed the work. The liability, if any, would be for damages for breach of contract.

ORAL OPINION.

After a trial upon the facts, the court rendered the following opinion, which sets forth the facts in so far as necessary and not previously set forth in the opinions on demurrers and a motion to amend, in 16 Haw. 711 and 17 Id. 28, 132.

FREAR, C.J. The petitioner claims four items of the Territory. That of \$811.50, the balance of the contract price, is admitted; that of \$10, for driving two extra piles, also is admitted; that of \$18 is disallowed for lack of sufficient evidence to support it, which is practically conceded by the petitioner; that of \$91.75 also is disallowed for lack of sufficient evidence to support it. In regard to the last mentioned item, it was necessary to show that, inasmuch as it was an extra, there was authority in writing, in accordance with the terms of the contract, for performing the work for which this amount is claimed, that is, the removal of materials from the wharf to the Brewer warehouse. It appears that the order in writing from the superintendent of public works was made on the claim that the work was required by the contract and on the condition that there should be no payment for it, and of course there could be no liability to pay for it unless that order was modified; the petitioner replied in writing to the letter containing the order, that the work would be done but that payment would be expected or that the right to payment would be reserved if there was any such right, but that proposed modification was not accepted by the superintendent.

Now as to the counterclaim of the Territory. The items of \$40, \$10, \$6, \$140 and \$70, for the use of the pile driver, pump and drill scow and for cement, are admitted with the exception of a portion of the item of \$6 for the pump, but in the opinion of the court the evidence sustains that item and that as well as the others is allowed. The items of \$75, \$70, \$25 and \$118—

which is the correct amount, the \$119 being a clerical error apparently—are admitted so far as the use of the drill scow and of the diver and crew for which these items are claimed are concerned, and so far as the amounts are concerned, but liability is denied on the ground principally that they were required by reason of the petitioner being obliged to drive the piles deeper than the contract called for; that contention has been practically overruled at previous stages of the case and is now overruled; consequently all these items amounting to \$288 are allowed. The next item is one of \$5 for removing two 75 foot piles from the wharf to the government pile; that is disallowed on the evidence as not sufficiently proved. The item of \$307.50 for inspector from the time of the expiration of the extension of the contract until the completion of the work is disallowed for the reason, among others, that it is claimed in the answer and counterclaim as for labor furnished to the petitioner, which of course it was not; if it could be claimed at all it would be by way of damages resulting from the breach of the contract, but the counterclaim is not sufficient to support that.

The result therefore is that judgment may be entered for the petitioner for the sum of \$322.50.

D. L. Withington for petitioner.

M. F. Prosser, Deputy Attorney General, for defendant.

CARLOS A. LONG, ADMINISTRATOR-DE-BONIS-NON-WITH-THE-WILL-ANNEXED OF THE ESTATE OF ROBERT WILLIAM HOLT, DECEASED, *v.* R. WILLIAM HOLT, GEORGE H. HOLT, EDWARD S. HOLT, CHRISTOPHER J. HOLT, ELIZABETH K. RICHARDSON, HELEN A. HOLT, AND HELEN A. HOLT, AS GUARDIAN OF THE ESTATES OF VALENTINE O. HOLT, WATTIE E. HOLT, AMELIA A. HOLT, HELENE A. HOLT, AND IRENE HOLT, MINORS, FREDERICK E. STEERE, MAKAHA COFFEE COMPANY, LIMITED, A CORPORATION, HAWAIIAN REALTY & MATURITY COMPANY, LIMITED, A CORPORATION, GEORGE LUCAS, TRUSTEE, D. H. LEWIS, AND HELEN A. HOLT, AS ADMINISTRATRIX OF THE ESTATE OF JAMES R. HOLT, JR., DECEASED.

APPEAL FROM DISTRICT COURT, EWA.

SUBMITTED NOVEMBER 20, 1905. DECIDED DECEMBER 7, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TAXES—*illegal assessment.*

An assessment of taxes to an "estate" is not authorized. *Holt v. Savidge*, 17 Haw. 84.

LEASE—*forfeiture.*

A lease in which the lessee covenanted to pay the taxes cannot be forfeited for the nonpayment of the taxes by the assignees of the lessee where there is no legal assessment.

OPINION OF THE COURT BY WILDER, J.

This is a summary possession action brought by plaintiff in the district court of Ewa, Oahu, to forfeit a lease held by defendants of certain lands in Waianae and to recover possession of said lands, the ground of forfeiture being a breach of covenant to pay the taxes on the land. The lease was made on November 22, 1862, by W. A. Aldrich, executor of the last will and testament of R. W. Holt, deceased, to John Dominis Holt, for the period of the natural life of the lessee. The defendants are the present holders of the lease, some of them being subtenants under the others. The lease provides that the lessee, his administrators and assigns, "shall and will at their own proper costs and charges bear and pay and discharge all such taxes, duties and assessments whatsoever as shall or may during the said term granted be charged or assessed or imposed on the said demised premises." The plaintiff alleges a wilful failure, neglect and refusal on the part of all of the defendants to pay the taxes assessed upon the demised premises for the years 1900 to 1903 inclusive. The evidence showed that the taxes for each one of the years in question were assessed to "Est. Holt, R. W." Judgment was rendered in favor of defendants on the ground that no taxes had been legally levied or assessed upon the lands. Plaintiff appealed to this court on the point of law that the district court erred in deciding that the taxes assessed upon the premises were not legally assessed and in deciding that the non-payment of said taxes by defendants did not constitute a cause of forfeiture for the lease in question.

The assessments in question were void. It was held in the case of *Holt v. Savidge*, 17 Haw, 84, that "an assessment of taxes to the estate of M. A. Barete is not authorized by statute * * * The defendant is right in his claim that the assessment ought to be made to some one whose duty it was to pay the taxes."

The assessments being void and illegal, no one was under liability to pay them. Under this lease all that the lessee cov-

enanted was to pay the taxes that shall be assessed upon the premises, which means such taxes as were legally assessed. See *Scott v. Society*, 81 N. W. (Neb.) 624. The lessor is not prejudiced by an invalid assessment nor by the nonpayment by the lessee of taxes which are not legally assessed.

Cornwell v. Colburn, 15 Haw. 632, is relied on by plaintiff, but that case is not in point, as the validity of the assessment was not questioned there.

The judgment appealed from is affirmed.

C. W. Ashford and *E. A. C. Long* for plaintiff.

A. G. M. Robertson, Thayer & Hemenway, E. C. Peters, Smith & Lewis for defendants.

IN THE MATTER OF THE APPLICATION OF S. AHMI
FOR A WRIT OF PROHIBITION AGAINST MARY
BUCKLE AND THE CIRCUIT COURT OF THE
FIRST CIRCUIT (HON. JOHN T. DE BOLT, FIRST
JUDGE.)

ORIGINAL.

ARGUED DECEMBER 4, 1905. DECIDED DECEMBER 7, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TITLE OF ACT—*not too broad or too narrow.*

The provision of the Organic Act that "each law shall embrace but one subject, which shall be expressed in its title," should be liberally construed. The title may be broader than the act, provided it is not delusive; the act may cover different matters, provided they have a natural connection and are fairly embraced in one subject. A provision limiting civil jury trials, unless by consent, to the first sixty days of each term in the first circuit, may properly be included in an act purporting in its title to amend a

certain section of the Revised Laws "relating to terms of the circuit courts," the other provisions of which act relate to the length, adjournment and extension of the terms in the several circuits.

OPINION OF THE COURT BY FREAR, C.J.

The petitioner seeks by writ of prohibition to prevent the respondent from trying with a jury, against the petitioner's consent, during the remainder of the present September term of the circuit court of the first circuit, a certain action of assumpsit brought in that court by the respondent Buckle against the petitioner, which action was set for trial by the respondent, the circuit judge, on November 27, 1905, the said term of court having begun on September 4, 1905. The petitioner relies upon the provision in Act 37 of the Laws of 1905 that "no jury trial, in any civil action, shall be commenced at any term of said circuit court for the first circuit, after sixty days of such term have elapsed, unless by the consent of all parties to such action, in the form of a written stipulation, duly filed, or of an oral stipulation, made in open court, and duly entered upon the minutes." The respondents contend that this provision is in conflict with section 45 of the Organic Act, which provides that "each law shall embrace but one subject, which shall be expressed in its title."

The title of the Act is "An Act to amend section 1646 of the Revised Laws of Hawaii, relating to terms of the circuit courts." The act provides that the terms in the second, third and fifth circuits may continue twenty-four days, Sundays and legal holidays excepted, with a proviso that any such term may be extended by the presiding judge for not more than twelve days; that the terms in the first and fourth circuits may continue until the time for commencing the next succeeding terms, with a proviso that the April term in the first circuit shall not extend beyond the last Saturday in June, and a further proviso containing the sixty-day provision above quoted; that the judges in all circuits may adjourn court from time to time during the term or without day; and that any term in any circuit shall

stand extended for the completion of any trial already begun at the time when the term would otherwise expire.

The respondents contend, first, that the title is too broad or that the provision in question is not expressed in the title, and cite cases which hold that acts purporting in their titles to be general, as, for instance, relating to all cities in the state, are void under similar constitutional provisions if they in fact are of a special nature, as, for instance, if they relate to only certain cities or cities of a certain class. The mere fact that the title of an act is broader than the act itself does not render it void; the generality must be of such a nature as to mislead or be delusive. It is not necessary that an act "relating to terms of the circuit courts" shall provide everything in regard to such terms or shall contain only similar provisions as to all terms in all circuits or as to all terms in each circuit. If an act would be void in case it related to terms in one circuit only while its title related to terms in all circuits, still the act in question or the provision in question is not void, for the act does relate to all terms in all circuits. It is not contended that all provisions of law must be uniform as to all terms or in all circuits, but merely that in a single act purporting in its title to relate to terms in all circuits the provisions must be uniform. This contention cannot be sustained.

The respondents contend, secondly, that the title is too narrow or that while it embraces but one subject, as it should, the act itself embraces two subjects, namely, one in regard to terms of circuit courts and one in regard to the classes of cases that may be tried at such terms or during portions of such terms. As already appears, the act, besides providing for adjournment of terms from time to time or without day, provides that the terms in certain circuits shall have a certain duration and the terms in the other circuits a certain different duration, but that all such terms shall be extended for the purpose of concluding trials already begun, that the terms in the first mentioned circuits may be extended for certain periods by their presiding judges, that one term in one of the other circuits shall be short-

ened and that, in substance, under the provision now in question, all the terms in that circuit shall be shortened for the purposes of civil jury trials, except that such trials may be held by consent thereafter during such terms—very much as trials may, irrespective of this provision, be held by consent out of term altogether. This provision, as it seems to us, has a proper relation to the other provisions. The various provisions are not incongruous; they have a natural connection with each other, and are fairly embraced in one subject, which is embraced in the title of the act. The presumption is that the act is valid. The provision of the Organic Act which is now invoked should be liberally construed. Under these circumstances the provision in question should be held valid. See *In re Walker*, 9 Haw, 173; *Dole v. Cooper*, 15 Haw, 299.

The preliminary or alternative writ may be made perpetual.
C. W. Ashford for petitioner.

C. F. Clemons for respondents; *Thompson & Clemons* on the brief; *E. C. Peters, Attorney General*, by permission also filed a brief.

MARY K. TIBBETTS v. S. M. DAMON, C. M. HYDE, J.
O. CARTER, W. O. SMITH AND W. F. ALLEN,
TRUSTEES UNDER THE WILL OF B. P. BISHOP.

QUESTION RESERVED BY CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 27, 1905. DECIDED DECEMBER 8, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

JUDGMENTS—*estoppel*.

A judgment against a plaintiff who sues A. for a piece of land does not estop plaintiff from subsequently suing B. for another piece of land comprised in the deed to A., where the sole issue of fact in the two cases is identical, unless B. is in privity with A. *Kalaeokekoi v. Kahale*, 7 Haw. 147, overruled.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment in which the first circuit court reserved for the consideration of this court a question arising from the following facts admitted by stipulation: That both plaintiff and defendants claim title to the property sued for and set out in the complaint of plaintiff through one G. D. Kuiaia as a common source of title and that said G. D. Kuiaia by deed dated May 15, 1879, conveyed said property to one Lahela Kapoli (w); that there were two persons of the name of Lahela Kapoli, and that from one of them plaintiff received a deed of the premises and that from the other the defendants received a deed of the premises sued for; that the sole question of fact at issue in this action is the identity of the grantee in the deed from G. D. Kuiaia, that is, is plaintiff's grantor or defendants' grantor the Lahela Kapoli who was the grantee in the deed from G. D. Kuiaia; that in an action of ejectment commenced on June 29, 1899, by the present plaintiff against one S. Pali, which was tried at the August, 1899, term of the first circuit court for the recovery of a piece of land other than that sued for in the present action but conveyed by said deed of G. D. Kuiaia to Lahela Kapoli, the sole issue involved was the identity of the grantee in the deed from G. D. Kuiaia, and after a trial a verdict was rendered for the defendant and judgment entered thereon, which was affirmed in the supreme court in 14 Haw. 517; that the complaint in the present case was filed on April 11, 1899. The reserved question is as follows: Does the judgment referred to in the case of *M. K. Tibbetts v. S. Pali* estop M. K. Tibbetts, plaintiff herein, from maintaining this action?

The question in dispute in this case is one of identity, namely, whether the plaintiff's or the defendants' grantor was the grantee in the deed from Kuiaia. Defendants claim that this was settled in the case of *Tibbetts v. Pali*, 14 Haw. 517, which, under the ruling in *Kalaeokekoi v. Kakele*, 7 Haw. 147, forever bars plaintiff from suing other defendants for another piece of land covered by the same deed from Kuiaia.

The general rule is that judgments bind parties and their privies in blood, in law and in estate. *George v. Holt*, 9 Haw. 47.

Privity is a mutual or successive relationship to the same rights of property. Thus, in order for one to be bound by a judgment as a privy to one of the parties he must have succeeded to some right, title or interest of that party in the subject matter of the litigation. 2 Black, Judgments, Sec. 549.

An examination of the record in *Kalaeokekoi v. Kahele*, 7 Haw. 147, shows that one Kalaeokekoi brought ejectment against Kahele and others on a claim of paper title and also by adverse possession. Defendant pleaded in bar an estoppel by judgment, in that between the same plaintiff and one D. Kahanu the paper title and that by adverse possession claimed by plaintiff for one of the pieces covered by the same patent and sued for, although as contended included inadvertently in the declaration, had been adjudicated. The plea was sustained. Kahanu, the defendant in the first suit, was a grantee of Kahele, the defendant in the second suit, and thus Kahele was not in privity with Kahanu so as to be bound by a judgment against Kahanu previously rendered. So far as estoppel by former judgment is concerned, a grantee is in privity with his grantor, but the converse is not true that a grantor is in privity with his grantee.

"A judgment in ejectment includes parties who are summoned, or who voluntarily appear, but does not include a landlord who is not impleaded or does not defend in the tenant's name or his own." *Castle v. Kapiolani Estate*, 17 Haw. 63.

In the case in 7 Haw. 147 the point that Kahele was not in privity with Kahanu so as to be bound by a former judgment against the latter was not called to the attention of the court, and we must hold that the case was through inadvertence erroneously decided and must be overruled. We do not regard that case as establishing a rule of property, so that, if erroneous, it should not be overruled.

In the case at bar the defendants are not in privity with the defendant S. Pali in the first case, and consequently there is no identity of parties and no estoppel by former judgment.

The circuit court of the first circuit is advised that the judgment in the case of *M. K. Tibbitts v. S. Pali* does not estop the said M. K. Tibbetts, the plaintiff herein, from maintaining this action.

W. C. Achi for plaintiff.

S. H. Derby for defendants; *Kinney, McClanahan & Cooper* on the brief.

JAMES LOVE *v.* JAMES LOVE, JR., ANNIE K. HART
AND THE HENRY WATERHOUSE TRUST COM-
PANY, LIMITED, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 29, 1905. DECIDED DECEMBER 11, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

VOLUNTARY CONVEYANCE TO TRUSTEE—*whether of a testamentary nature—whether revocable because grantor meant it to be, and thought it was so and was not advised of necessity of reserving power to revoke—refusal of amendmnt of bill.*

The plaintiff, upon being released from a spendthrift guardianship, August 28, 1901, conveyed property to J. L. Jr., and A. K. H., and also to A. L. R., in consideration of his regard and affection and of \$1., and in the same indenture conveyed other property to a trustee in trust with certain power to sell and invest proceeds and to pay to him the income for his life and, at his death, to convey the property and its proceeds or the investments thereof to J. L. Jr., and A. K. H. Becoming desirous of revoking the trust he declared in writing, April 5, 1904, that, while he ratified the trustee's acts so far, he revoked the appointment of a trustee and the trusts declared in the deed. He afterwards brought this suit against the trustee and beneficiaries to obtain a decree declaring that he had revoked the trusts and that they are now revoked and requiring the trustee to cease acting as such and to reconvey the

property to the plaintiff and account to him for the money received; also for a decree that neither of the beneficiaries has any right in the property to be reconveyed. The plaintiff claimed that the deed was revocable by him because his bill avers that it was made voluntarily, for the use of apparent strangers and without consideration from them, without his intention that it be irrevocable and with his understanding and belief that it was revocable and could be rescinded by him at any time and that his attorney, who prepared the instrument, did not advise him that he ought to make provision for revoking the trust. The judge, after sustaining a demurrer, refused to allow an amendment and decreed dismissal of the bill without prejudice. Held, as to the amendment, without passing upon its materiality or effect, the case ought not to be remanded with direction to allow it as its refusal was "in the exercise of a discretion with which we are not justified in interfering"; and also: the plaintiff's claims are not sustained,—(1) that the trust is void for indefiniteness, ambiguity and uncertainty, or (2) that the conveyance is a testamentary disposition of property, or (3) that the conveyance is revocable upon the alleged facts, following *Afong v. Afong*, 5 Haw. 191, and *Cummins v. Carter, et al.*, ante, p. 71.

OPINION OF THE COURT BY HARTWELL, J.

This was a bill in equity to establish the plaintiff's claim that he had a right to revoke a conveyance in trust made by him without reserving a power of revocation.

He bases the claim upon the facts that the conveyance was made voluntarily, without consideration from either of the beneficiaries and without his intention that the trust should be irrevocable but with the understanding and belief that it was revocable and could be rescinded at any time by him, and that he was not advised by his attorney who prepared the instrument that he ought to make provision for revoking the trust.

The conveyance is by indenture "made this 28th day of August, A. D. 1901, at the hour of 2:05 o'clock, p. m.," by and between James Love, "he having been prior to the execution hereof fully released from a spendthrift trust," of the first part, Annie K. Hart of Honolulu, and James Love, Jr., her brother,

in Japan, of the second part, Annie L. Rowe, of the third part and George A. Davis, designated as trustee, of the fourth part, witnessing that the plaintiff, in consideration of his affection and regard for said Annie K. Hart and James Love, Jr., and of one dollar paid to him by them, conveys to them "and their heirs and assigns forever" all his life estate in certain land, that for like consideration he conveys to Annie L. Rowe certain land in fee, and that in consideration of two dollars paid to him by the trustee he conveys to the trustee and "to his heirs and assigns forever" certain other parcels of land, to hold with the appurtenances "unto the said trustee and to his successors and assigns forever on the following trusts, that is to say":

In trust (1) to manage, collect rents and pay charges; (2) in his discretion to purchase the lessee's right in the land on the Southwest corner of King and Kekaulike streets; (3) as soon as practicable to sell the unleased portions of the said land, and upon securing the lessee's interest therein before said sale to sell that also, but at not less than \$25,000, unless said James Love first consent in writing to a sale at a less price; (4) in his discretion to sell "the land or extend the lease on the land on the Southwest corner of King and Kekaulike streets"; (5) "out of the proceeds of the sale of said premises on the Southwest corner of King and Kekaulike streets to pay that certain mortgage for twelve thousand dollars of even date given by the said James Love to Thomas Fitch on said premises"; (6) "to invest the net proceeds of all sales of land * * * after paying said mortgage and after paying to Annie K. Hart one thousand dollars, in good and proper security for the investment of trust funds, and to vary such investments from time to time as in his judgment shall be proper"; (7) "to pay the net income, rents, issues and profits from the said property and investments to the said James Love for life"; (8) upon the death of said James Love, upon the joint requests in writing of said Annie K. Hart and said James Love, Junior, to sell all the said lands and premises then remaining unsold and to pay the net proceeds therefrom in equal shares to the said Annie K. Hart and the said James Love,

Junior"; and (9) "in default of the said requests in writing, to convey the said lands and premises then remaining unsold to the said Annie K. Hart and said James Love, Junior, their heirs and assigns forever, freed and discharged of all trusts herein."

The indenture was signed and acknowledged by the plaintiff and trustee and was recorded.

The bill avers that before executing the indenture and at about the same time the plaintiff mortgaged all his real property in Honolulu to Thomas Fitch to secure payment of promissory notes aggregating \$12,000; that January 16, 1902, the trustee, with the plaintiff's consent in writing under the power of sale in the trust deed, sold certain of the property for \$20,000, of which \$1,000 was paid for brokers' commissions and \$2,370 upon the Fitch mortgage notes, reducing the mortgage debt to \$10,000, the purchaser securing payment of the rest of the purchase money by his notes secured by mortgage of the property; that the time of payment of the Fitch mortgage was extended until January 16, 1912, the purchaser assuming the payment and Fitch agreeing that his mortgage stand upon an equality with the mortgage by the purchaser; that June 19, 1902, Fitch assigned his mortgage to Bishop & Co., to secure a loan to him of \$3,000, which is not yet paid; that June 6, 1903, upon the trustee resigning, the defendant corporation was appointed a new trustee and is now acting as such.

The plaintiff, becoming desirous of revoking the trust, made a written declaration April 5, 1904, declaring that he ratified and confirmed "the lawful acts and doings of the said George A. Davis while acting as his trustee" and "the acts and doings of said Henry Waterhouse Co., Ltd., as my trustee", and that he thereby did "revoke, rescind, vacate and annul the appointment by me of a trustee and each and every of the trusts declared and accepted in the trust deed." The trustee refusing to comply with the plaintiff's request to pay over to him the trust moneys in its hands except the net income thereof, or to reconvey to him the unsold land included within the trust deed, and the beneficiaries claiming that the trusts are irrevocable, the bill prays

for a decree declaring that the trusts were revoked by the plaintiff and are now revoked, and that the trustee be ordered to cease acting as such and reconvey the unsold trust property to the plaintiff and account to him for all moneys received by it as trustee; also that a decree be made declaring that neither of the beneficiaries has "any right, title or interest, legal or equitable," in the property sought to be reconveyed to the plaintiff. The trustee answered, the other defendants demurred and the judge sustained their demurrer and, refusing to allow an amendment, decreed the dismissal of the bill without prejudice, from which decree the plaintiff appealed.

The substance of the amendment is that at the date of the trust deed the plaintiff had been relieved from a spendthrift trust, his guardian having been removed by decree of court and the plaintiff restored to full capacity to manage his own property; that he desired to be relieved from managing it but not to surrender his right to control it except in collecting rents and paying expenses and after being relieved from "an unjust and unnecessary spendthrift trust he had no intention whatever of yielding up to any trustee the right to convey, assign, mortgage or otherwise deal with his property" otherwise than as above mentioned; that he consulted with Thomas Fitch, his attorney in the removal proceedings, who advised him to execute the trust deed; that the beneficiaries were not informed of the deed which was made without their knowledge, and that the plaintiff's understanding, "derived from his consultation with and from the advice of the said Thomas Fitch," was that the trusts were revocable at any time by himself and that the only object of appointing the beneficiaries from the plaintiff's death, as explained to him by his attorney, "was to provide for the possible contingency" of his death before revoking the trusts or otherwise disposing of his property, and that since the execution of the trust deed he "has been more than once informed and given to understand by the said Thomas Fitch" that the trusts "could be at any time by him revoked."

Without passing upon the effect or materiality of any of

the matters averred in the amendment, we do not think that we ought to remand the case with direction to the judge to allow the amendment, the refusal of which by him was an action "taken in the exercise of a discretion with which we are not justified in interfering." *Trust Co. v. Grant Locomotive Works*, 135 U. S. 226; *National Bank v. Carpenter*, 101 *Ib.* 568; *Wilson v. Liliuokalani*, 13 Haw. 470.

We cannot adopt the suggestion of the plaintiff's attorney that the trust is "void for indefiniteness, ambiguity and uncertainty" by reason of the trustee's power being broad enough to permit him so to handle the property that at the grantor's death there would be nothing left for the beneficiaries. There is one parcel of land conveyed which is not included in the trustee's power of sale and the terms of the trust require that either the unsold land or investments representing the proceeds of sales be kept intact until the grantor's death then to be divided equally between the cestuis que trustent.

The plaintiff claims that if the trust is not void for the reason above suggested by him the trust conveyance is "purely a testamentary disposition of property" on the grounds that "the record shows no tie of any kind" between the plaintiff and the cestuis que trustent; that the latter "are invested with no present interest in any property whatever" and "acquire no interest until the death of the appellant and then the interest depends upon the contingency of the existence of unsold lands"; but it is not true that the trust deed vests in the cestuis que trustent no present interest or that they acquire no interest until the grantor's death or that it depends then upon whether land shall remain unsold. The plaintiff in his deed creates the ordinary trust of a conveyance in trust to pay the grantor the income for his life and at his death to convey the trust property to designated persons.

It would be immaterial to any question in this case whether the cestuis que trustent have a vested or a contingent equitable remainder and we have no occasion to discuss the nature of their estates since the gift over would not fail or the fee revert to the donor or his heirs before the contingency, if there were any,

occurred. We do not intimate that a contingent estate is created by the deed; we allude to the matter only in order to point out that the trust would not be imperfect if there were such uncertainty in regard to persons ultimately to take. It is true that the record does not show the relation between the grantor and the beneficiaries, but the indenture recites his regard and affection as a consideration for his grant to them. The name of one of them leads one to infer that neither he nor his sister, the other grantee, is a stranger to the grantor. But the absence of meritorious consideration for a conveyance to strangers in no way affects its validity. One has a right to make any legal disposition of his property that he thinks fit, whether for those whom he is legally or morally bound to provide for or others.

The cases cited by the plaintiff, in which the court decided that instruments were wills and not deeds, are not decided upon the theory of the invalidity of a voluntary conveyance, and in no way sustain the plaintiff's claim.

Thus in *Sharp v. Hall*, 5 So. 499 (Ala.), an instrument admitted to probate as a will gave the grantee no use of the property during the life of the maker, and was not delivered but placed in an envelope endorsed: "Not to be opened until after my death."

Millican v. Millican, 24 Tex. 442, was a case in which the grantor's heirs claimed that his deeds were voluntary donations not meant to take effect until after his death, and also were in fraud of the statute of wills. The court held that the deeds operated as a present disposition of the property and were attended by a transfer of the property, the donor parting with her entire control over it, the court saying that equity "will not set aside a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, or undue influence, and made by the donor voluntarily, when not laboring under any deception or mistake of facts."

In *Stroup v. Stroup*, 140 Ind. 180, a conveyance to a trustee required the trustee, at the grantor's request, to convey the land to such person or persons and upon such terms and for such uses

as the grantor should direct and to pay all the proceeds to him. The grantor's widow brought suit for dower in the granted land which the court allowed her, holding that the trustee had only a naked trust with no power of disposition and that under the statute the conveyance was "void as to the trustee and shall be deemed a direct conveyance to the beneficiary."

In *Burlington University v. Barrett*, 22 Ia. 72, the court held that a certain instrument was testamentary in its nature, partly because it used the word "bequest" with reference to its disposition of certain property and partly because it passed no interest or right until the maker's death.

In *Allison's Executors v. Allison*, 11 N. C. 123, the decedent had executed a will and on the same day another instrument conveying property to trustees to sell the same upon his death and dispose of the proceeds as directed in the instrument. There could be no doubt that this instrument was a will although, as it had not been properly executed, it was not admitted to probate.

In *Crocker v. Smith*, 10 So. 258 (Ala.), an instrument was held to be a will in which a decedent gave to his wife all his estate which he then or might thereafter own. In the absence of covenants of warranty the deed would be ineffectual to convey after acquired property although as to such property it would properly operate as a will. It also contains the clause "This deed of gift to take effect absolutely at my death."

In *Wren v. Coffey*, 26 S. W. 142 (Tex.), the decedent had made a deed conveying his homestead to his son "should we not sell or dispose of the same before death." It does not appear that the deed had been delivered and it was held to be a will.

In *Hixon v. Witham*, 1 Chan. Cas., 22 Eng. Rep. 784, an instrument, claimed to be a will, began with the words, "This indenture." At first it was questioned whether it was a will because of the use of those words "but the defendants deserted that point and yielded that it was a will."

In *Peacock v. Monk*, 1 Ves. Sr. 130 (27 Ib. 936), a party had made two instruments, one of which he called a deed by way of agreement between himself and another person and the

other he called a will. The decedent's creditors claimed the benefit of a trust under the deed. Lord Hardwicke said, "B. being both executor in the will and contractor in the deed, and both instruments being executed at the same instant (as it must be taken, being on the same day), it speaks the whole to be a testamentary act. In several cases, the nearness of one act to another makes the Court take them as one; so that it is a testamentary act, though not strictly so, because not revocable."

In *re Morgan's Goods*, 1 L. R. Prob. & Div. 214, the decedent conveyed his property to trustees for the benefit of his children, directing in the conveyances that they were not to take effect until after his decease.

In *Attorney General v. Jones*, 3 Price, 368, A, by indenture containing a power of revocation, assigned leasehold property to C, and D, also certain stock and other personal estate upon trust to himself and, after his decease, to B, an illegitimate daughter; A, subsequently, by will, confirmed the deed, except as to certain particulars, and appointed the trustees in the deed as executors; he did not transfer the stock or part with possession of the leasehold or even inform the trustees of the deed. The Barons of the Exchequer, one dissenting, held that the property assigned was liable to legal duty. "This decision has been generally condemned and may be regarded as overruled." 1 Jarman, Wills, 6 Ed. 23.

Finally, the plaintiff claims that his trust deed is revocable because "without consideration, purely voluntary and without even the knowledge of the cestuis que trust," and because "it was made (merely for business convenience) after the appellant had been relieved from a spendthrift trust (but under professional advice and assurance), and with the full belief that it was revocable at any time." There is enough in the bill, without looking at the amendment, to show that he made the deed after being relieved from the spendthrift trust and also that he made it under professional advice, or, which is the same thing, that his attorney, who prepared the deed, did not advise him that he ought to make a provision to revoke the trust.

We may also infer from the fact that the conveyance to a trustee would relieve the plaintiff of the care of managing the property "as a matter of business convenience" that this was his object as well as to benefit those to whom, in the same indenture, he had out of his regard and affection for them, gratuitously assigned a leasehold. These are the only motives for the settlement expressed in the indenture. In equity a conveyance made or a contract entered into by a person of legal and mental capacity may be declared void if induced by fraud, duress, undue influence, misrepresentation, or, in contracts, of mutual mistake of fact or of mistakes of fact and law. In such cases the act is voidable but does not become void by the party calling it so. So an act may be so improvident and unreasonable as to justify the inference that it was done under some delusion or by one whose mind was so enfeebled as to render him incompetent to transact business, when proof would be required to show that the act was done intelligently, with knowledge of its consequences. The case presents none of these conditions unless in the alleged fact that the plaintiff intended to make, and thought he was making, a revocable, and not an irrevocable, conveyance and that he was not advised of the necessity of a power of revocation. A grantor's ignorance of the contents of his voluntary deed of gift or of its legal effect or his belief that it contains an important provision which it does not contain or the failure of his attorney to advise him of its contents and their legal effect are facts which, under certain circumstances, justify an inference of his mental incapacity, but there is no rule that such facts alone are sufficient to enable the grantor to avoid his deed.

In the recent case of *Cummins v. Carter, et al.*, ante p. 71, the plaintiff sought to obtain a revocation of a voluntary settlement made by him because, among other reasons, at the time he executed the trust deed he did not understand its provisions and had no legal advice as to their effect, which he thought was only for a special purpose, not realizing that the deed was irrevocable, and because he was not advised to have a clause of

revocation inserted and believed that the deed, except as to certain provisions for the benefit of his wife, was in the nature of a testamentary disposition of his property. The court held that if the plaintiff did not fully realize the scope or effect of the deed "it was his duty to have ascertained its effect and he cannot complain now that he was mistaken as to them, not having taken the necessary steps to inform himself."

Most of the cases cited by the plaintiff in the case before us were considered by the court in *Kellett v. Sumner*, 15 Haw. 86, in which a voluntary settlement was held to be revocable by the settlor, under the circumstances of that case, one of the material facts being that the settlement gave the settlor during his lifetime the use of the property, which, at his death, was to go to such persons as he should, by a certain will, made, as was supposed, contemporaneously, name and appoint, and, in default of such appointment, to his heirs at law. The deed recited that the settlor was a resident of Tahiti, then temporarily in Honolulu, and that he desired that his property in Hawaii should be "in charge of some competent and disinterested person." The deed showed, as the court thought, "that it was of a temporary nature and for his own convenience." There is no parallel between that and the present cases.

In *Afong v. Afong*, 5 Haw. 191, the plaintiff thought that he retained the power of disposing of the trust property otherwise than as expressed in the deed of settlement which contained no power of revocation. The court held that a mistake of the legal effect of the instrument of settlement would not avail the settlor and also that, even in the absence of a clear intent to make an irrevocable gift where a sufficient motive for the gift exists, the settlement cannot be disturbed. A reference to the files in that case shows that the attention of the court was called to the same English decisions as are cited by the plaintiff in this case, and that the court, while considering that they go further than the Massachusetts cases in authorizing equity to vacate a voluntary settlement, adopted the Massachusetts rule as expressed in *Viney v. Abbott*, 109 Mass. 300, and *Sewell v. Rob-*

erts, 115 *Ib.* 22. The case did not show what advice the settlor had from his attorney who drew the deed, but as the expressed object was to protect the settlor's Hawaiian wife and children the settlement had to be irrevocable whatever the settlor may have wished or thought.

Although this case appears to us to be controlled by the ruling in the *Afong* and *Cummins'* cases, we have looked into the cases cited by the plaintiff with the conclusion that they do not justify us in modifying those rulings or in sustaining the plaintiff's contention.

Thus in *Wollaston v. Tribe*, 9 L. R. Eq. Cas. 44 (1869), a lady, in contemplation of marriage, had settled property on herself for life then on her husband for life, then on her children and those of any future marriage and, if no children, on nephews and nieces. The husband died without issue and the lady not having married again, it was held that the settlement then subsisting was purely voluntary and not within the consideration of marriage. Comment is made upon the importance of advice to the settlor that her deed would be irrevocable as to the nephews and nieces and upon the fact that the nature of the settlement had never been fully explained to her, but the case was decided upon the ground that the gift over to the nephews and nieces after the husband's death was "not within the consideration of marriage." In *Coutts v. Acworth*, *Ib.* 519 (1870), a lady having, in anticipation of marriage with J. B., settled property upon him for life over to nephews and nieces, the deed containing a power to revoke the trusts subsequent to his life estate, by her will, made after marriage, revoked all the trusts and gave £1000 to her husband. Held: that while the power of revocation extended only to the remainder the husband must elect whether to take under the will or the deed. In *Everitt v. Everitt*, 10 *Ib.* 405 (1870), a settlement made by a young lady of the age of twenty-one, in order to provide for herself and her children if she married, reserving no power of revocation, being made precisely as if a definite marriage was con-

templated, was held to be so imprudent and improvident that it could not be sustained.

In *Prideaux v. Lonsdale*, 1 DeG., J. & S. 335 (1863), a young lady, induced by executors, made a settlement of bank stock upon trust for herself for life and afterwards as she should by deed or will appoint, in default of appointment, for her next of kin who would be entitled if she died intestate without having married, with the proviso that on her request the trustees should dispose of the fund as she might direct. She executed this deed without any professional advice and married about two months after. Upon her death her husband brought suit to set aside the settlement. The only reason suggested to her for the settlement was to prevent her brothers from troubling her for money. She was engaged to be married to the plaintiff at the time but of this the executors, who advised her to make the deed, were not aware. The court held that it was improper to deal with the lady's legacy in the way in which it was dealt with; that the executors "ought to have paid it directly to the lady herself, leaving her to exercise an unfettered judgment as to the mode in which it should afterwards be dealt with," and that the settlement was one "which it is impossible to suppose that the lady understood, which was not properly prepared either in form or in substance, which it was not reasonable or prudent for her to execute and against which she ought to have been cautioned."

In *Richards v. Reeves*, 149 Ind. 427, an old and infirm person conveyed her real estate to her son upon condition that he pay a certain sum of money to their grandchildren upon arriving at the age of twenty-one years, reserving a life estate to herself and husband and intending to reserve the right to revoke the deed should she find the interest reserved to herself and husband insufficient for their support, but by ignorance and mistake on the part of the scrivener, as well as on her own part, the right of revocation was not expressed in the deed. The deed was set aside, the court saying, "Equity will set aside such a voluntary gift when it is made to appear that the donor did not

intend to make it irrevocable or where the settlement would be unreasonable or improvident for lack of a provision for revocation." The latter ground was sufficient.

In *Fredericks' Appeal* 52 Pa. 338, a decedent had placed his property in trust for his life and, after his death, for his children. The court, for reasons, which are not clear to us, held that the grantor's "manifest intention was simply to promote his own convenience and protect his own interests and that the utmost that could be made of the deed was that it was a mere covenant of posthumous gifts and, as such, nudum pactum." This case is regarded in 186 *Ib.* 538, and 202 *Ib.* 558, as a case of "rare and exceptional facts." In *Russell's Appeal*, 75 *Ib.* 269, a marriage settlement was made providing for the intended husband, as well as the settlor, and after her death to convey the estate to her children, according to testamentary appointment, except such provision for her husband as she might make, by will, out of the income and, in default of issue, to convey to her brothers and sisters or their issue as she might appoint. The wife surviving the husband, who died without issue,—held: that under the circumstances the absence of a power of revocation was a mistake, none of the parties concerned nor their counsel having contemplated the contingency of the plaintiff surviving her intended husband; also that as there was no motive or reason for making the settlement apply to the case of the wife surviving her husband, but, on the contrary, this was against the donor's interests or desire and without intention she had "done this unwise and evidently mistaken thing." The court said: "In the absence of a certain intent to make the gifts irrevocable the omission of a power to revoke is prima facie evidence of a mistake and casts the burthen of supporting the settlement upon him who, without consideration to benefit him or protect the donor, claims a mere gratuity against one as sui juris capable of taking care of his own estate." The mistake, the court thought, was not one simply of law but of fact, "so mixed with the legal effect of the writing that equity will use the mistake of fact as a means of relief. The mistake here

was in not perceiving or being conscious that a case was left unprovided for which might happen, and in which event the settlor would desire to make a provision agreeable to her wishes and will, * * * not a mistake merely of the legal operation of the instrument but a mistake flowing from the want of conception or a misconception of facts which might occur and were not provided for." In *Miskey's Appeal*, 107 *Ib.* 611, it was held that in the absence of a proof of a distinct intention to make an irrevocable gift the conveyance would be set aside *if the other circumstances of the case required it*. The other circumstances included undue influence, great mental weakness from excessive use of intoxicating liquor and a deception practiced by the donees.

In *Leiau, et al., v. Kahaikalua*, 7 Haw. 86, a widow, just before her second marriage, conveyed her property to her brother upon his agreement to support her and allow her to live on the land during her life. The mutual object of this conveyance was to prevent the husband from acquiring any interest in the property. The husband having died, and the plaintiff marrying a third husband who owned property enough to support her and her children, she brought suit to compel her brother to quitclaim the property to her, the object of the conveyance having been accomplished. The court declared the defendant a trustee for the plaintiff and required him to execute a deed of quitclaim to her.

None of these decisions are applicable to the facts of the present case. In *Toker v. Toker*, 3 DeG., J. & S., 492 (46 E. R. 726; 1863), the court says: "It is going too far to say that no voluntary settlement can be valid unless the settlor is advised that there should be a power of revocation inserted in it. What the court has to be satisfied of in these cases, as I apprehend, is this, that the settlement, whether containing or not containing a power of revocation, is the free determined act of the party making it; and the absence of advice as to the insertion of a power of revocation is a circumstance, and a circumstance merely, to be weighed in connection with the other circumstances

of the case." In *Phillips v. Mullings*, 7 L. R. Chan. App. Cas., 248 (1871), the court says of a voluntary deed: "All that the law requires in a deed of this description is that it should be effective, and should not contain any extraordinary clauses, unless those clauses are shown plainly and distinctly to have been brought to the notice of the settlor, and to have been understood by him. It is not necessary to shew that the usual clauses inserted by conveyancers were explained; but any unusual clause must be shewn to have been brought to his notice, explained and understood."

The plaintiff acknowledged his deed of settlement in the statutory form declaring that he made it freely and voluntarily for the uses and purposes therein set forth. The ordinary view of a layman in executing a deed is that it is not subject to revocation by himself. There is nothing unusual in this deed; on the contrary, it appears to have been a reasonable and prudent act on the plaintiff's part. He suggests no reason for his present desire to revoke the deed, hence we infer that he desires to make other persons than those mentioned in the deed the objects of his bounty. We are not prepared to think that any attorney who practices before this court would advise the plaintiff that if he should execute and deliver this deed of trust he could afterwards revoke it at will, for if the attorney knew no better than this he was unfit to practice law. On the other hand, if the plaintiff told his attorney that he wished to place his property with a trustee to pay him the income for his life and then to convey it to J. L., Jr., and A. K. H., but that he might change his mind and so wished the deed to reserve his right to revoke it whenever he liked, an attorney who would draw a deed omitting to follow such instruction would deserve disbarment and to be held in damages. Moreover, in such a case we ought to decree revocation of the deed, not because the plaintiff misunderstood its effect, or understood that he could revoke it, but because he had been deceived into making it. But the case does not go to

this extent and shows no ground for declaring the deed to be revocable.

The decree appealed from is affirmed.

H. E. Highton for plaintiff.

A. G. M. Robertson for defendants.

D. L. Withington for the trustee.

LAU BOW *v.* FRED M. KILEY AND JAS. B. GORMAN.

APPEAL FROM DISTRICT COURT, HONOLULU.

ARGUED DECEMBER 4, 1905. DECIDED DECEMBER 11, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PLEADING—*amendment—abuse of discretion.*

Plaintiff having been nonsuited in an action on a promissory note on the ground that the note was not stamped, the evidence showing that the note had been given for goods sold and delivered, the district court abused its discretion in refusing to allow plaintiff to amend the complaint by adding a count for goods sold and delivered.

OPINION OF THE COURT BY WILDER, J.

Plaintiff sued defendants in the district court of Honolulu in assumpsit upon a promissory note. At the trial plaintiff proved that defendants were partners in buying and selling bananas, and that the note sued on was given plaintiff for bananas purchased by defendants. The note was refused in evidence on the ground that it was not stamped. Plaintiff thereupon moved for leave to amend his complaint by adding thereto a count for goods sold and delivered to defendants by plaintiff, which motion was denied, and plaintiff was nonsuited. Plaintiff appealed to this court on the point of law that the dis-

strict court erred and grossly abused its discretion in refusing to allow the amendment.

The district court undoubtedly had the power to allow this amendment. The only question is whether it abused its discretion in refusing to allow it.

In the case of *Lum Sung v. Luning*, 13 Haw. 665, the declaration described the plaintiffs as "Yee Sing Tai Company" and the proofs showed the name of the firm to be "Yee Sing Tai." It was held that the circuit court abused its discretion in refusing to allow plaintiffs to amend by striking out the word "company." The court said on page 667: "This is one of the amendments which the trial court was by the statute specifically authorized to allow, to wit, a correction in the name of a party. It was not a change or substitution of parties. The power being thus conferred, it is the duty of the court to exercise it in a proper case. * * * It may be that the matter of the allowance of amendments is largely within the discretion of the trial court. Even under this rule, however, where there is an abuse of discretion, the appellate court may reverse. In this case we think there was an abuse of discretion. The furtherance of justice required, beyond question, the allowance of the amendment; no possible prejudice could result therefrom to the defendant."

The case at bar is not as clear as that one, yet the application of that rule requires us to hold that the amendment asked for should have been allowed, and that it was an abuse of discretion to refuse to allow it. Defendants could not have been prejudiced by the allowance of the amendment, as one of them had testified that the note had been given for goods sold and delivered, and they were, or could have been, as well prepared to defend against the action on the note as against the action for goods sold and delivered.

In *Wo Sing & Co. v. Kwong Chong Wai Co.*, 16 Haw. 17, this court intimated that an amendment similar to the one in question should be allowed. That was an action for a balance alleged to be due for goods sold and delivered and also for the amount of a note. In connection with the count on the note

the original note, although unstamped, was introduced, the objection on the ground of its being unstamped not having been raised in the trial court. The court said on page 20: "It is well settled that an unstamped instrument may be admitted for collateral purposes though not to sustain an action upon it as such. It is unnecessary to say whether the note in question was admissible for any purpose under the count for goods sold and delivered. For it is clear that even if it were not, the objection to it might have been obviated by procuring it to be stamped in the manner provided in section 13 of the stamp act, as amended (see *Makainai v. Goo Wan Hoy*, 14 Haw. 683, 684), or the first count of the complaint might have been amended so as to permit of a recovery for the consideration of the note, that is, the goods sold and delivered, in payment for which the note was given,—for the note, not having been paid at maturity did not operate as payment for the goods, and a recovery could be had on the original contract." This court seems to have taken it for granted that if the specific objection to the note had been made in the trial court and the note consequently not allowed in evidence yet the complaint could have been amended so as to obviate the difficulty.

McKeague v. Helen, 3 Haw. 328, relied on by plaintiff, is not in point, because in that case the action was for money had and received and the police justice ordered a nonsuit on the ground that the remedy was by an action on the case, but this court held that it was properly brought for money had and received.

Although negligence and laxity in pleadings should not be encouraged, yet amendments should be liberally allowed, particularly in the district court, to conform the pleadings to the facts proved.

The appeal is sustained, the judgment set aside, and the case remanded to the district court of Honolulu for further proceedings consistent with this opinion.

A. S. Humphreys for plaintiff.

No appearance for defendants.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND
WILLIAM O. SMITH, TRUSTEES, v. THE TERRI-
TORY OF HAWAII.

ORIGINAL.

ARGUED DECEMBER 11, 1905. DECIDED DECEMBER 11, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PLEADING—*motion to strike out portions of plaintiffs' petition not required in action at law.*

The plaintiffs declaring for breach of an agreement, the defendant moved to strike out portions of their petition as irrelevant: *Held*, although the petition is in the form of code pleading the defendant is not required to admit or deny each averment, but under our practice denies generally, pleads a special defense or demurs. The motion is not required and is denied.

ORAL OPINION.

HARTWELL, J. The plaintiff's petition claims the sum of \$15,000 from the Territory for breach by the Territory of an agreement made in 1849 between the government of the Kingdom of the Hawaiian Islands and the American Board, the petitioners claiming to be successors of the board; the agreement in effect being that in consideration that the board would relinquish to the government of the Kingdom its claim to certain land at Lahainaluna and transfer to that government the seminary buildings, furniture, books and apparatus therein, that government would continue the seminary at its expense as an institution for the cultivation of sound literature and solid science and would not teach or allow to be taught any religious

tenet or doctrine contrary to those theretofore inculcated by the mission and expressed in the confession of faith, a copy of which is attached to the petition; that in case of nonperformance of the conditions of the transfer, the property should revert to the board, represented by the Hawaiian mission, and if that government should divert the establishment to other purposes than of education it should pay \$15,000 to the mission, representing the American Board.

The breach of this agreement alleged is that since 1903 the Territory has changed the institution to an agricultural school and taught no religious doctrines whatsoever, or sound literature or solid science.

The petition is in the form of a code pleading, a narrative of facts; perhaps it contains matters of evidence which, under the code system, should be struck out, but I am not familiar with code pleading enough to say. I infer that in the motion to strike out parts of the petition the deputy attorney general has that system in mind, but the motion is not required by our system of law and practice. This is not a bill in equity and is not to be treated as such. There is no requirement that the defendant admit or deny each averment. All that it needs to do is to make a general denial, which means a denial of facts well pleaded; if it has a special defense to plead it, or, if it conceives that the case does not present a cause of action, to demur. A demurrer that the petition shows no cause of action would raise the questions of law in the case, as, for instance, whether the agreement was assignable and has it been assigned; if not enforceable against the Kingdom of the Hawaiian Islands, is it enforceable against the Territory; is the contract binding on the Territory; do the facts averred show a breach of the agreement, if so, does the Organic Act excuse nonperformance in prohibiting the Territory from appropriating money for a sectarian school? I see no advantage in incorporating into our practice any features which are applicable to a code system. I am giving my own thought and do not know whether I speak for my colleagues.

FREAR, C.J. I have nothing to add to what Mr. Justice

Hartwell has said, except, perhaps, that I should qualify his last statement. There might be some advantage in introducing some elements of the code pleading; I don't know that it would be advantageous to exclude them entirely; they have in some respects been introduced into our practice by statute. But I do not mean to imply that they should be introduced by judicial decision so far as concerns modes of defense, which alone are involved on this motion to strike.

The opinion of the court is that the motion should be denied and it is denied.

The plaintiffs' attorneys were not called.

M. F. Prosser, deputy attorney general, for defendant.

IN RE ASSESSMENT OF TAXES, GAY & ROBINSON.

APPEAL FROM TAX APPEAL COURT, FOURTH TAXATION
DIVISION.

ARGUED DECEMBER 11, 1905. DECIDED DECEMBER 11, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ASSESSMENT—of land under special conditions.

The owners cultivated at a loss certain cane land, the crop from which was milled for 7-16 thereof by a corporation under the terms of a lease of other land made by the owners to the corporation, the owners having the alternative under the terms of the lease of renting the land to the corporation for 1-30 of the product. Held: the land was improperly assessed as cane land free of conditions; and the growing crop was improperly assessed on the basis of a high price of sugar of a particular time instead of a price that could reasonably be expected during a considerable period and without making sufficient deductions for the cost of cutting and milling.

Id.—enterprise for profit.

Combined property, though properly assessed as a whole as the

basis of an enterprise for profit, should be assessed by itself and not in connection with other property, though owned by the same persons, leased to others and assessed separately.

ORAL OPINION.

The property consists of 800 acres of cane land, the crop of cane growing thereon, certain other lands and leaseholds, livestock, buildings, furniture, wagons and implements, at Waimea, Kauai. It was returned by the taxpayers, a partnership, as separate items at values aggregating \$281,485, and assessed by the assessor as a whole as the basis of an enterprise for profit at \$400,000, which assessment was sustained by the tax appeal court. The taxpayers appealed. Adjoining land owned by the appellants was leased to the Hawaiian Sugar Company, a corporation, at an annual rental of 1-16 of the sugar produced up to 5000 tons, 1-20 of the sugar over 5000 tons and up to 7500, and 1-30 of the sugar in excess of 7500 tons. Under the same lease the appellants' cane raised on the land in question was to be milled by the company for 7-16 of the product, but the appellants could surrender the land to the corporation and receive as rental the percentage of the product specified in the lease. It was contended for the assessor, among other things, that the possible rather than the actual income should be considered as one of the factors going to show the value of the property, and that therefore to the actual income of the entire property now in question there should be added \$2500, the amount of the loss for each of the last two years in cultivating the cane land, and \$5700, the amount of the rent that might be obtained for the land, the first of which items would disappear and the second of which would appear if the appellants surrendered the cane land to the corporation instead of cultivating it themselves, in which case the total average net income per year for several years from the entire property would be \$20,000 or so; also that as the property is assessed as the basis of an enterprise for profit, it should be considered in connection with the other land which is leased to the corporation and assessed at \$600,000, and that

therefore the value of both properties should be estimated with reference to the combined incomes from both, at, say, \$1,000,000, and then the value of the property in question ascertained by deducting the assessed value of the other from the estimated value of both; also that for the same reason there should be taken into consideration the fact that the lease of the other land would expire in 1939, when the appellants would be entitled to the valuable improvements on that land as well as the land itself.

FREAR, C.J. The property in question was properly assessed as the basis of an enterprise for profit under the provisions of the statute. Of course this does not mean that the assessed value should be fixed with reference to the income alone, although if that alone were considered the returned value would be ample. As the court has repeatedly decided, all matters that bear upon the valuation of the property as a whole should be taken into consideration. In this particular instance, as stated by the assessor himself, the principal items are those of the 800 acres of cane land and the growing crop of cane upon the same.

Apparently the assessor valued the land irrespective of the peculiar conditions to which it was subject, looking upon it as simply so much unusually good cane land; but it cannot be looked upon in that way. The owners apparently had either one of two alternatives, namely, to cultivate the land themselves or else to surrender it to the Hawaiian Sugar Company under the terms of the lease of other land and receive the rent for it. This puts the land in very much the same position in which it would be if it were tied up under a long lease at a fixed rental, which might be less than its fair market rental. If the owners should cultivate the land themselves, as they are now doing, it must be borne in mind that they are obliged to pay 7-16 of the product for milling purposes, which, of course, is an extraordinarily high proportion. If, on the other hand, the owners should surrender the land to the plantation under the lease and receive, under the terms of that lease, only 1-30 of the product, that would be an unusually small proportion; and of course in

that case the entire item of the growing crop would disappear, for then the growing crop would belong to the plantation and not to the appellants.

In regard to the other item, that of the growing crop, apparently the assessor in estimating the value of that has placed the price of sugar at too high a figure, taking that of a date when it was particularly high instead of such as could reasonably be expected during a considerable period, and has not made sufficient deductions for the cost of cutting and milling.

While this property is properly assessable as the basis of an enterprise for profit, its value cannot be estimated by taking into consideration the value of the neighboring property which is under lease to the Hawaiian Sugar Company, or the fact that that lease is to expire in 1939 and that upon its expiration the improvements will revert to the lessors, the appellants; that is a distinct property for the purposes of this appeal. It has been so treated by both the appellants and the assessor.

If we deduct from the assessment made by the assessor the amounts which, in the opinion of the court, should be deducted on the two items referred to, the assessment is brought within the amount returned by the appellants and therefore the decision of the tax appeal court is reversed and the assessment fixed at the amount for which the property was returned by the taxpayers.

A. Perry and D. L. Withington for taxpayers.

W. S. Fleming, deputy attorney general, for assessor.

TERRITORY OF HAWAII v. JOHN RICHARDSON.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED DECEMBER 4.

DECIDED DECEMBER 6.

OPINION FILED DECEMBER 12, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EMBEZZLEMENT—instructions appropriate to defense of accounting to one assuming to be the owner's agent—wrong instructions, effect upon of right instructions—comment upon frivolous exceptions.

Instructions which might be appropriate in a civil action for recovery of the money entrusted to the defendant are not appropriate in a charge of embezzling money. The effect upon a jury of wrong instructions is not removed by giving right instructions upon the same subject, the jury not being instructed to disregard the wrong ones. The practice of taking frivolous exceptions in the trial of a case deserves censure and is condemned by the court.

OPINION OF THE COURT BY HARTWELL, J.

The defendant was indicted, tried and convicted of the offense of embezzling \$1049.66, Sept. 20, 1903, belonging to one John Tallett, being money received by the defendant on a check dated September 8, 1903, drawn by A. N. Kepoikai on Bishop & Co., payable to the order of John Tallett. The jury found defendant guilty as charged, the defendant's bill of exceptions averring that it was a verdict of "guilty of having embezzled the sum of \$1049.66."

The bill of exceptions refers to matters which appear only from examination of papers filed as exhibits and which, although alleged to be so, are not incorporated in the bill.

The following exceptions were allowed: 1, to overruling the

defendant's plea in abatement based, we infer, upon a previous indictment for the same offense. The plea does not state whether the defendant had been tried upon this or whether any proceedings had been taken and therefore it is left for our inference that it had been *nolle pross'd*. 2 recites from the transcript several pages of an examination of a juror on his *voir dire* and that the defendant excepted to the disallowance of his challenge to the juror. In 3 it appears, after reading several pages of the testimony of the witness Tallett that the defendant excepted to his being asked whether, after his receipt for the check, he ever consented to the defendant using the money. 4, to the denial of defendant's motion to strike out the evidence of the witness that the way he knew that the paper, evidently meaning the check, given him by Hayselden, was money, was that he heard people say so. 5, to asking the witness if he gave his son-in-law authority to dispose of this paper money. 6, to asking the witness Kepoikai what amount of money he accounted for to Tallett and to his evidence that before sending the money, upon return of his account approved, he sent his draft on Bishop & Co., on that account. 7, 8, 9, 10 and 11, to evidence of McKenzie, agent of the Bank of Bishop & Co., testifying for the prosecution, concerning deposits made and checks drawn on the account of defendant's daughter. 12, 13 and 14, to evidence of Tallett's daughter that she had not consented to the defendant disposing of the check except by depositing the proceeds in her father's name and to not allowing her to be asked, on cross-examination, whether she had made any statement during the trial that she was "here to collect my money," or had asked the defendant to give her money on account of this transaction which she wished to pay to her husband. (This last exception is sustained.) 15, to the prosecution asking Tallett's lawyer what he did for Tallett concerning the money after being retained by Tallett's daughter. 16 to refusing to allow defendant to ask his witness, Decoto, whether his promissory note, which the witness had testified that Tetzlaff had told him that he took from the defendant for about one thousand dollars, was payable to Tetzlaff or

his wife. 17, 18, 19 and 20, to refusing to allow the defendant to place in evidence certain checks on the defendant paid by the witness in October and November, 1902, being, as defendant claimed, for account of Charles Tetzlaff, or to allow the witness to testify to the amounts deposited with him by the defendant in September and October, 1903, or to show other checks in October, drawn by the defendant, payable to his daughter, as well as in favor of Charles Tetzlaff and one in favor of Tallett. (Exception 20 is sustained.) 21, to allowing the prosecution in cross-examining the defendant to ask whether a purported copy presented to him was a true copy of a receipt by Tallett of Kepoikai's check, which receipt had been in some manner removed from the files.

The foregoing exceptions, with the exception of 14 and 20, are overruled. They are, indeed, too frivolous to deserve comment. It is unfortunate for the administration of justice that trials should be delayed and useless expense caused to the Territory by trifling exceptions. Even if attorneys, who indulge in such practice, believe that they are impressing their client or jurors, the practice deserves censure. Perhaps the trial judge hesitates to rebuke attorneys for such things lest that may prejudice the jury against the attorney's client, but this court does not hesitate to pronounce its condemnation upon the practice. There are well established rules governing the form of questions to witnesses and the admissibility of evidence and an attorney is more likely to show his ignorance of those rules than to benefit his client by taking frequent and unmeaning exceptions to testimony.

We now proceed to serious exceptions. The defendant's case depended upon whether he had accounted for the money received by him on the Kepoikai check in favor of Tallett, its owner, by his transactions with Tallett's daughter and son-in-law, the Tetzlafs and had done so in the honest belief, based on the facts within his knowledge, that the owner had held the Tetzlafs out by his former course of dealing as authorized to represent him concerning the disposition of the proceeds of the check; and did

not depend upon whether Tallett himself had, in fact, so authorized them, since if the defendant, while acting under that belief, had accounted to them for the money, whatever his liability in an action by the owner, Tallett, it cannot be said "that he, without the consent and against the will of the owner, fraudulently converted or disposed of the same," which is essential to the offense of embezzlement. Sec. 2965, R. L.

The defendant, in his own testimony, claimed that Tallett's son-in-law, Tetzlaf, coming to his office with Hayselden, who, as attorney for Tallett, had obtained the Kepoikai check, handed him the check and, at the same time, Hayselden's bill of \$59. for services, requesting the defendant to pay the bill and take it out of the check, which he did; that Tallett's daughter afterwards talked with him about disposing of the proceeds of the check by depositing it for her youngest child, which he advised her not to do, suggesting that it be deposited in her own name or some other and that afterwards Tetzlaf, in the presence of his wife, at the defendant's office, suggested that the defendant give him his demand note as he was in charge of defendant's business and had the privilege of taking money out of the business, and that the daughter said that was agreeable to her and the following morning defendant gave Tetzlaf his demand note for the money payable to Mrs. Tetzlaf's order; that on account of that note defendant, besides the \$59 item to Hayselden, paid other sums, including \$77 paid to the deputy tax assessor for Tallett's taxes and various sums to Tetzlaf amounting to \$649.66, for which he had Tetzlaf's receipt "on acc. of A. N. Kepoikai check No. 551 for \$1049 66-100 which was placed in his hands for deposit by my wife. 1. Bal. of \$400 00-100," concerning which Tetzlaf, August 13, 1904, wrote to the defendant: "Circumstances now compel me to ask you for an immediate settlement of the claim which I have against you amounting to \$400.00 and the nature of which you are fully aware, as cash obtained from my wife," that on receipt of the letter he saw Mrs. Tetzlaf who told him she did not want him to pay over again the amount he had paid for her husband but wanted him to pay her some of the \$400

so as to be able to follow her husband who she expected would be going to San Francisco, defendant telling her that if she wished to go to San Francisco he would try to give her the \$400 to go there; that soon afterwards the Tetzlafs placed the matter in the hands of an attorney, Coke, who was willing to take the \$400 on account but not in final settlement; that the defendant was willing to pay them the same upon receiving a full receipt for the account.

As to exceptions 22, 23 and 24, to refusal to give certain instructions not shown in the bill, they cannot be considered further than the requested instruction which does appear, viz.: "If you find that John Tallett's agents, or either of them, accepted the promissory note of defendant wherein and whereby defendant promised to pay the money in question to said agents, or either of them, you must acquit the defendant," the exception to the refusal to give which is overruled.

Exception 25, to an instruction which simply embodies the statutory definition of embezzlement, and also exception 33, instructing the jury that no demand was necessary to constitute the crime of embezzlement, are overruled.

The following instructions (Exceptions 26, 27, 28, 29, 30, 31 and 32) incorrectly state the law upon the subject:

"To constitute a conversion so as to make out a case of embezzlement, the owner must be deprived of his property or money by an adverse using or holding, but the means by which this is accomplished are immaterial.

"If the jury believe from the evidence, that John Tallett did not hold out Charles Tetzlaff to the world as having authority to collect the moneys mentioned in the indictment or any part thereof, or did not knowingly permit the said Charles Tetzlaff to so act, then, any payment on account of said moneys by the defendant to the said Charles Tetzlaff is no payment to John Tallett the principal.

"One who deals with an agent is put upon inquiry as to the extent of the agent's authority, and assumes the risk of the agent having authority to bind his principal in the transaction in which they are engaged.

"In order to create an agency by representation or estoppel,

it is essential that the principal should have knowledge of the assumption by the agent of the powers he has exercised.

"In order that the principal may ratify the acts of an agent, the principal must have knowledge of all the facts pertaining to the transaction.

If "Charles Tetzlaff assumed to act on behalf of Maria Tetzlaff, and induced the defendant to pay to the said Maria Tetzlaff certain moneys on account of the moneys mentioned in the indictment and (that) the said Charles Tetzlaff made the representation that it was to be payment on account of the said moneys mentioned in the indictment, and if the jury believe from the evidence, that the said Maria Tetzlaff received the money so procured from the defendant, but that the said Maria Tetzlaff had no knowledge of the representation made by the said Charles Tetzlaff, then the jury are instructed that the said Maria Tetzlaff did not ratify the act of the said Charles Tetzlaff and the representation made by him in regard thereto.

If "the money representing the proceeds of the check of A. N. Kepoikai, to John Tallett for \$1049.66, and dated September 8, 1903, was by the defendant converted to his own use and thereafter he made restoration of certain portions of the moneys so converted by him, that such act on his part is no defense."

The foregoing instructions, if applicable in a civil action for money had and received, are not appropriate to an indictment for embezzlement.

It is true that the jury were also instructed fully and correctly to the effect that they must find "that there existed in the mind of this defendant a conscious, wilful and felonious purpose to violate the law;" that "a failure to pay over the money does not raise any presumption of felonious conversion;" that if Tallett "at the date of the alleged embezzlement had lost the ownership of the property, then the jury should acquit," and that if he appointed either of the Tetzlafs as his agent in the matter of this money "without restriction as to any special use to which the money was to be put, it was within the scope of said agent's authority to loan the money to defendant and take his promissory note therefor, and if you find that said agent did loan the money to defendant you must acquit him;" also that if the Tetzlafs "were acting as the agents and had control of

John Tallett's money, their acts were binding on John Tallett, and in such case their transactions for the defendant are presumed to have taken place with good faith on his part and should entitle him to an acquittal," but the jury were not told to disregard the objectionable instructions above mentioned which, if allowed, would have required them to pay no attention to the defense, whether they believed it to be true or not, nor were the jury told that the instructions excepted to were to be regarded as modified by or taken in connection with the instructions which were afterwards given.

Accordingly, exceptions 26, 27, 28, 29, 30, 31 and 32, to giving instructions which we have held to be wrong, are sustained.

We hardly think that the sustaining of exceptions 14 or 20 would require the verdict to be set aside. It is on account of the instructions excepted to as above that we decided, by decision filed herein December 6, that the sentence should be vacated, the verdict set aside and a new trial ordered.

M. F. Prosser, deputy attorney general, for the Territory.

W. A. Kinney and R. B. Anderson with Ballou & Marx for defendant, at argument on exceptions.

IN RE ASSESSMENT OF TAXES, GAY & ROBINSON.

APPEAL FROM TAX APPEAL COURT, FOURTH TAXATION
DIVISION.

ARGUED DEC. 11 AND 12, 1905.

DECIDED DEC. 12, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ASSESSMENT—*enterprise for profit.*

In ascertaining the net income of property forming the basis of an enterprise for profit with a view to estimating the value of the

property as a whole, there should not be deducted a sum which the owners are obliged by a personal covenant to pay annually during the life of the grantor of a life interest as part of the purchase price of that interest. Under the statute which authorizes an assessment of property as a whole which consists of several items combined as the basis of an enterprise for profit, it is the property and not the enterprise that is assessable.

ORAL OPINIONS.

The property consists of a stock ranch comprising the island of Niihau with an area of 46,680 acres or more, the buildings, fences, furniture, etc., thereon, 50 horses, 500 cattle, 20,000 to 25,000 sheep, and other stock; also the Niihau fishing rights. It was returned by the appellants, a partnership, as separate items of the aggregate value of \$81,170, and assessed as a whole as the basis of an enterprise for profit at \$150,000, which assessment was sustained by the tax court. The appellants are under a covenant to pay to the grantor of a life interest \$3500 yearly for the remainder of his life, the expectancy of which was about eight years, not, however, to exceed 28 payments in all.

FREAR, C.J. As stated by counsel for the appellants three classes of evidence were introduced as bearing upon the value of this property, which was assessed as a whole as the basis of an enterprise for profit. Of these three classes, doubtless, as suggested also by counsel, that in regard to the income producing capacity of the property is the most important under the special circumstances of this case. In regard to this the principal question seems to be whether, in estimating the net income, there should be deducted the sum of \$3500, which the owners of the property are obliged to pay annually as part of the purchase price, as we construe it, of a life interest in one-half of the land. In our opinion this should not be deducted. It is practically conceded that it should not be deducted if the tax were simply a tax upon the property itself or the land itself, which constitutes the bulk of the property. The argument to show that it should be deducted is based upon the fact that this entire prop-

erty is assessed, not as individual items of which it is made up, but as a whole as the basis of an enterprise for profit. That argument is unsound, as it seems to us. The right to this \$3500 is not an interest in the land; it is not a lien upon the land; the obligation to pay arises under a personal covenant made by the purchasers of the life interest. The covenant does not run with the land. Under the statute which provides for the assessment of property as a whole which constitutes the basis of an enterprise for profit, it is the property and not the enterprise that is taxed. If this combined property should be sold, the purchaser would take it free of the obligation to pay the \$3500 yearly, and could continue managing it in precisely the same way as the present owners manage it and derive from it the same income, including the \$3500 a year. That, of course, should not be deducted in such a case. It should not any more be deducted when the property remains in the ownership of the appellants. Even if it ought to be taken into consideration in ascertaining the value of the property in so far as the amount of income shows the value, it should not be deducted from the income; it would be considered in a different way, that is, the value of the property as a whole would be considered with reference to the entire net income including the \$3500, and then a deduction would be made of the present worth of \$3500 a year during the expectancy of the life of the person entitled to that \$3500, which, of course, would produce a very different result.

The average income, including the \$3500, for the two years immediately preceding the date of the assessment would be a little over ten per cent. on \$150,000, the amount for which the property was assessed. It seems to the court that this is not an excessive assessment in view of that income. The other two classes of evidence seem to bear out this result, one of them being in regard to the area of the land, which amounts to at least \$46,680 acres, and the estimated value of that land per acre, and the other being the evidence in regard to sales between members of the family interested in the property.

The decision of the tax appeal court is accordingly affirmed.

HARTWELL, J. I agree with the Chief Justice and will state certain ways in which I regard valuations. The statute appears to furnish two theories of valuation, one is the salable value which, if not shown by sales, is a matter of conjecture depending upon the capacity and experience of the valuer. My impression is that the best valuers are often men who cannot give definite reasons or rules for the valuation. If I were seeking to buy property and to get assistance from one whose judgment I thought was good, I should often value the opinion of that kind of a man—his almost instinctive opinion, which may be called a guess, surmise or assumption. At the same time one might attach great value to the results reached by him.

Another theory of valuation is the productive capacity which owners have shown of the property taken as an enterprise for profit. Without speaking for the court, I do not suppose that this eliminates other theories of value. Assuming that the property has been mismanaged by owners, who have carried on the enterprise at a loss, at less profit than others might reasonably be expected to make, the actual earnings would then not be a proper basis of valuation. I think that way of valuing property as a whole, as an enterprise for profit, is intended really to increase values of each item when used together, and that if they have a greater value than has been made of the combination their actual value is considered.

D. L. Withington and *A. Perry* for taxpayers.

W. S. Fleming, *Deputy Attorney General*, was not called for the assessor.

HAROLD JEFFS v. HONOLULU RAPID TRANSIT &
LAND COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 13, 1905. DECIDED DECEMBER 13, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

STREET CAR TRANSFER—*passenger may rely on conductor's representations, when.*

A passenger may rely on a representation of a street car conductor that a transfer was good at a particular point from one line to another parallel line running in the same direction two short blocks distant, the transfer being punched in a blank space in the column of lines to which transfers are usually given but containing nothing to indicate that it was not good as represented.

ORAL OPINION.

This is an action for damages for an ejectment from a street car. According to the plaintiff, he boarded a southward bound King street car at the corner of Bethel street and when the car stopped at Alapai street, asked for a transfer to Beretania street. The conductor replied "Beretania?" and, upon plaintiff's answering "yes," punched a transfer check and handed it to him. The Beretania line started two short blocks distant on Alapai street from King street and ran southward parallel to King street. The transfer, besides being punched as to time, was punched as to the connecting line in a blank space in a column in which the other spaces contained printed names of other street lines. There was a line along Alakea street from King street to Beretania and beyond, but it was used regularly for passenger traffic along only one of the two blocks between

those two streets. The plaintiff, on receiving the transfer, walked up Alapai the two blocks and boarded the Beretania car, from which he was ejected on the ground that the transfer did not entitle him to a ride on that line. The conductor testified that he told the plaintiff that he could not give him a transfer to the Beretania line, and that the corner of King and Alapai streets was not a transferring point, but that he, the plaintiff, could continue on King street to the McCully street junction (a mile and a half or so distant), transfer there to the Punahou line and ride back on that (in a round about way) to the corner of Alapai and Beretania streets, and then take the Beretania car there, which was the point at which the plaintiff took it after walking the two blocks. The transfer, however, was not punched in the space in which "Punahou" was printed. It was contended by the defendant, among other things, that the plaintiff was not entitled under the statute to a transfer at that point from the King to the Beretania line, and that the conductor was without authority to make a contract for such a transfer, and particularly without consideration, inasmuch as the transfer was not requested when the fare was paid, and that the evidence did not support the finding that the conductor represented that the transfer was good at that point.

FREAR, C.J. The court must take the findings of fact by the circuit court as correct in so far as there is evidence to support them. The circuit court found, as we construe its decision, that the plaintiff boarded one of the defendant's cars at a point on King street to the north of the junction of King and Alapai streets and that upon the arrival of the car at that junction the plaintiff asked the conductor for a transfer to Beretania street and that the conductor gave him such a transfer, representing by implication at least that the transfer was good at that point; that the plaintiff then left the car and proceeded up Alapai street for two short blocks and boarded the Beretania street car, from which he was ejected on the ground that the transfer did not entitle him to a ride upon that car. This finding is sup-

ported by the plaintiff's testimony as to his request for a transfer and the reply of the conductor, the fact that the request and reply were made at that particular point, and the further fact that the transfer which was given was punched in a blank space and not in the space in which it should have been punched if the conductor, as testified by him, had represented that the transfer was good only at the McCully street junction. It is unnecessary to say whether the plaintiff was entitled under the statute to a transfer from the King street line to the Beretania street line at that point. He was justified in relying upon the representation of the conductor. It is not necessary to hold even that there was a new contract made between the conductor and the plaintiff after the first contract, if it could be considered a contract, was entered into at the time when the fare was paid. The representation by the conductor was sufficient. This view is in line with the remarks of the court in the case of *Rhodes v. Rapid Transit Co.*, 16 Haw. 329, and the decision in *Ashford v. Rapid Transit Co.*, 16 *Id.* 580.

Accordingly, the exceptions are overruled.

D. L. Withington for the defendant.

P. L. Weaver was not called for the plaintiff.

TERRITORY OF HAWAII EX REL. C. H. WILLIS v.
D. KANEALII.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

ARGUED NOVEMBER 27, 1905. DECIDED DECEMBER 19, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ELECTION—not void though nominating petition forged.

The provisions of the election laws relating to nominations are mandatory in the sense that the officers to whom they apply are

obliged and may be required to comply with them before election; but a failure to comply with them does not, in the absence of a provision so declaring, invalidate the election unless it prevents a fair vote. The election of a county supervisor is not void because the signatures to the petition for his nomination were forged.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal by the respondent in a quo warranto proceeding from a judgment ousting him, at the instance of an opposing candidate, from the office of supervisor of the county of Kauai, on the ground that the signature upon his nomination petition, which was required (R. L. Sec. 31) to be signed by not less than twenty-five qualified electors and deposited with the secretary of the Territory, were forged. The statute (*Id.*, Secs. 71, 72), provides also that the ballots, which are prepared by the secretary, shall contain the names of all candidates "who have been duly nominated in the manner in this chapter provided, and shall contain no other name." These and other provisions of the general election laws, so far as applicable and except as otherwise provided, are extended to county elections by the county act. Laws of 1905, Act 39, Sec. 29.

The principal question, and the only one that need be decided, is whether these provisions in regard to nominations are mandatory in the sense that noncompliance with them vitiates the election or merely in the sense that the officers or persons to whom they apply are obliged and may be compelled to comply with them prior to an election and are subject to the penalties prescribed by the statutes relating to offenses against election laws or to forgery or other statutes. In our opinion, in the absence of a provision to the contrary, the latter is the correct view in so far as noncompliance with the law in regard to nominations does not prevent a fair vote. It was deemed unnecessary to go into this question in the previous cases of *Kanealii v. Circuit Judge*, on mandamus and prohibition respectively, *ante*, pp. 1, 9.

The case most relied upon by the petitioner is that of *Price v. Lush*, 10 Mont. 61 (9 L. R. A. 467), in which the court held

that the election of one who had not been legally nominated was void under numerous English and British colonial decisions there referred to and on the principle that when one state adopts a statute of another it adopts also the construction put upon it by the courts of the latter. That decision was made under the Australian ballot system, which has been adopted in this Territory, though, of course, as in all American states and territories, with modifications; but it was overruled, as we understand, by the decision in *Stackpole v. Hallahan*, 16 Mont. 40 (28 L. R. A. 502), in which the court said, among other things:

"In *Price v. Lush*, the doctrine (as to the adoption of the construction of a statute with the statute itself) should have been taken with a modification, which escaped the attention of the court. The Australian ballot law was adopted from a monarchical government,—a limited monarchy, perhaps, but still of the nature of a monarchy. The law was brought from such a government to a republic. In the former the tendency is to limit and restrict the electoral franchise. In the latter the tendency is to extend the same. The particular form of ballot law known as the 'Australian System' was new to our jurisdiction, but construction of election laws generally was not with us a new field of law; and in the construction of election laws, the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors." See also *State v. Fransham*, 19 Mont. 273 (48 Pac. 1).

Other distinctions between the English and American systems are pointed out elsewhere.

From *Blackmer v. Hildreth*, 181 Mass. 29, we quote at some length as follows:

"Under our system of elections the voter receives at the polls from the election officers an official ballot, of which he does not know and is not expected to know anything except what appears upon its face; and as a rule it is impossible, as in this case, by an inspection of the ballot to ascertain whether or not there has been any irregularity in the preparation of it. He takes this ballot, sees upon it the names of the candidates, and, having expressed thereon in due form his choice, deposits it in the ballot box. Thus he duly expresses his will upon the paper pre-

pared and handed to him by the officers of the law appointed for that purpose. All this he does in good faith. * * * It is contended, however, by the petitioner, that the provisions of the election law above recited are mandatory and that as a necessary result the election of Dexter was void. On the contrary the respondents contend that in this case there was no such noncompliance with the provisions as to render the election void. * * * As stated by Andrews, C. J., in *People v. Wood*, 148 N. Y. 142, 147, 'The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors and not to defeat them.' This must be borne in mind in the construction of such statutes, and the presumption is that they are enacted to prevent fraud and to secure freedom of choice, and not by technical obstructions to make the right of voting insecure. The provisions above recited with reference to the preparation of the ballot are plainly limited and confined to that purpose. * * * But with the preparation of the ballot the influence of these provisions end. If there be irregularities like those in this case they do not accompany the ballot and taint it in the hands of the voter. This view of the statute gives due weight and scope to the provisions in question, and preserves the sanctity of the right of suffrage and its free and honest exercise. To hold otherwise would be to lose sight of the purpose for which these provisions were made, namely, to provide the method and time for the preparation of the ballot, and would subject our elections to intolerable and perplexing technicalities in no way material to the substantial merits of the controversy or to the freedom and result of the action of the voters. Its natural tendency would be to thwart rather than to secure a true expression of the popular will. We are aware that the courts of England and Australia are inclined to extend the operation of provisions similar to those in question further than is done in this case, but an examination of the English statute would seem to show that it expressly reserves to the courts a supervision over some of the decisions of the officers respecting the preparation of the ballots, upon a petition questioning the election after it has taken place. St. 38 & 39. Vict. c. 40, § 1. *Regina v. Parkinson*, L. R. 3 Q. B. 11. *Mather v. Brown*, L. R. 1 C. P. D. 596. *Howes v. Turner*, L. R. 1 C. P. D. 670. *Monks v. Jackson*, L. R. 1 C. P. D. 683. *Regina v. Miller*, 1 Australian Jur. 156. But whether that be so or not, we are not inclined to adopt a con-

struction which is so manifestly opposed to the general spirit of our laws and the freedom of our elections as that contended for by the plaintiff. For some decisions in other states in accordance with the views herein expressed, see *People v. Wood*, *ubi supra*, *Stackpole v. Hallahan*, 16 Mont. 40, and the cases therein cited, overruling in substance the previous case of *Price v. Lush*, 10 Mont. 61."

In *Jones v. State*, 153 Ind. 440, the court says:

"It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and, from the current of authority, the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to affect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. *Parvin v. Wimberg*, 130 Ind. 561; *Boyd v. Mills*, 53 Kan. 594, 608, 37 Pac. 16, 25, L. R. A. 486; *Miller v. Pennoyer*, 23 Ore. 364, 31 Pac. 830; *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; *Blankinship v. Israel*, 132 Ill. 514, 24 N. E. 615; *Adsit v. Osmun*, 84 Mich. 420, 18 N. W. 31, 11 L. R. A. 534; *McCrary on Elect.* §§ 27, 28, 29; *Endlich*, Int. of Stat. § 433."

This seems to be a correct statement. See also *Brandon v. Navarre*, 102 Mich. 259; *Bowers v. Smith*, 111 Mo. 45; *Allen v. Glynn*, 17 Colo. 338; *Baker v. Scott*, 4 Idaho 596.

In some cases emphasis is put upon the constitutional provision that the person or persons receiving the highest number of legal votes shall be declared elected, but we have a somewhat similar provision (in R. L., Sec. 99), which was enacted by reference by the Organic Act (Sec. 64), namely, that "the number of persons to be elected receiving the highest number of votes in any election district shall be declared to be elected."

In some cases also much has been made of statutory provisions, which are not found in our laws, providing for contests in regard

to nominations before the election takes place. But in *State v. Elliott*, 17 Wash. 18, the court held in effect that no such statute was necessary, and that the right to require the appropriate officer to send out proper ballots existed independently of statutes. In *Harris v. Cooper*, 14 Haw. 145, we held that the secretary of the Territory "not only may but should decline to place upon the ballots the name of any candidate if his nomination is not signed by at least twenty-five persons, or if among the signers there are not at least twenty-five qualified electors of the district," etc., and "the duty of the secretary in these respects is clearly prescribed by the statute. This duty also is ministerial and the courts may enforce its performance." Moreover, the statute (R. L. Sec. 102), provides that "All records appertaining to * * * any election, in the possession of * * * the secretary of the Territory, shall, at all reasonable times, be open to the inspection of any voter," and (Sec. 31) nominations must be "deposited with the secretary of the Territory not less than thirty days before the day of a general election or twenty days prior to a special election, except on the island of Oahu, where such nomination shall be deposited not less than ten days before the day of any election."

None of the cases that have come to our attention have gone so far as to hold that a fraudulent nomination as distinguished from a merely illegal nomination does not invalidate the election, but, on the other hand, no case, so far as we are aware, has held or intimated the contrary. It seems to us that the reason of the rule, which is based upon rights of the voters and the absence of a provision making the election void for noncompliance with the requirements for nomination, applies equally in both cases.

The circuit judge did not find that the respondent himself was implicated in the fraud or forgery. If he was, and should be convicted, doubtless the office would be vacated or he could be ousted from it under section 18 of the Organic Act.

The judgment appealed from is reversed.

J. D. Willard for relator.

W. S. Edings for respondent.

TERRITORY OF HAWAII v. FREDERICK SCHILLING.

ERROR TO CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED NOVEMBER 13, 1905.

DECIDED JANUARY 3, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ASSAULT WITH INTENT TO COMMIT RAPE—*plea of former conviction—fifth amendment—twice in jeopardy.*

Defendant pleaded former conviction before a district magistrate for assault and battery being the same assault charged in the indictment; also that he was informed and believed that the evidence at the trial before the magistrate showed an offense which in law amounted to a felony, for which, by section 2864, R. L., he could not afterwards be tried. Held: the offense for which the defendant was formerly tried and that for which he is indicted are within the statute (Sec. 2734, R. L.) providing that where the same act constitutes two or more "diverse and distinct offenses different in their nature and character, one not being merged in the other, the offender may be proceeded against for each and cannot plead a conviction of one in bar of proceedings against him for the other;" also that inasmuch as a verdict could not be given for an assault at the trial on the indictment the defendant was not placed twice in jeopardy for one and the same offense.

Held: that the statute (Sec. 2864, R. L.) contemplates a jury trial of a misdemeanor, and is not applicable to the defendant's case.

Id.—*remarks and comments of the court upon evidence reflecting upon course of defendant's attorney and restricting cross-examination upon nonessential matters.*

In respect of certain admonitions given by the court to the attorney for bringing up matters ruled out and certain remarks made by the court in explanation of its rulings excluding evidence, held: no error; also, that a certain comment of the court concerning the evidence probably comes within the statute (Sec. 1798,

R. L.) prohibiting a judge from commenting upon evidence, but that the comment, although perhaps open to criticism, is not likely to have affected the result and does not require a reversal of the judgment; whether, if this were not so, the statute is constitutional, *quaere*.

Id.—*evidence of complaint by prosecutrix accompanied by details of conversation between her and the person to whom she complained; held, admissible.*

Id.—*instructions refused and given.*

In view of the instructions given the court properly refused instructions requiring the jury to find that the defendant intended to accomplish his purpose by such force as to overcome by violence or fear any force the prosecuting witness might have been capable of offering; or that if he assaulted her with design to accomplish his purpose, only if he could get her consent, the act would only amount to an assault or an assault and battery; and that it was the duty of jurors not convinced of the defendant's guilt to refuse to join in a verdict of conviction. The court properly instructed the jury on the subject of intent in accordance with the law as laid down in *Lo Toon v. Territory*, 16 Haw. 353; and *Territory v. Wright*, Ib. 137, and properly presented the case in other respects to the jury.

OPINION OF THE COURT BY HARTWELL, J.

(Frear, C.J., dissenting.)

The defendant was tried, convicted and sentenced upon an indictment charging an assault with intent to commit the crime of rape. He pleaded a former trial and conviction by the magistrate of the district of Lihue of the offense of assault and battery and that the same assault was charged in the indictment. In a supplemental plea he also pleaded that he was advised that the facts shown at the trial of the assault and battery amounted in law to a felony and therefore that he could not afterwards be prosecuted for the felony under the statute, which provides as follows:

"If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to

be acquitted of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which said trial may be had shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be proceeded against for felony, in which case such person shall be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." R. L. Sec 2864.

The pleas were overruled, the court declining to hear evidence in verification of the plea of former conviction. The defendant excepted to the rulings and assigns them as error.

The statute on which the supplemental plea is based applies to a jury trial and does not authorize a magistrate to acquit of a misdemeanor upon finding that a felony is shown by the evidence and commit the defendant for trial for the felony. The court, in overruling the plea, must be deemed to have taken its averments as true. The question is therefore presented whether the plea was good.

The statute upon which the plea is based is as follows:

"No person shall be required to answer again for an offense, for which he has once been duly convicted, or of which he has been duly acquitted upon a good and sufficient indictment." R. L., Sec. 2731.

"Any person who has been tried and convicted of any offense before a court, tribunal or magistrate having jurisdiction of the case, shall not be subject to subsequent criminal prosecution therefor, and such conviction may be pleaded in bar of any such subsequent prosecution." Ib. Sec. 2732.

The statute further provides:

"Where the same act constitutes two or more diverse and distinct offenses, different in their nature and character, one not being merged in the other, the offender may be proceeded against for each, and cannot plead a conviction or acquittal for one, in bar of proceedings against him for the other." R. L., Sec. 2734.

Although the plea is styled a plea of *autrefois convict*, based upon the statute, it must also be considered as equivalent to a plea under the 5th amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb" which includes jeopardy of fine or imprisonment as well.

The two offenses of assault and battery and assault with intent to ravish are "diverse and distinct, different in their nature and character, one not being merged in the other" so that if "the same act constitutes" them "the offender may be prosecuted for each and cannot plead a conviction or acquittal for one, in bar of proceedings against him for the other" unless the statute conflicts with the twice in jeopardy clause of the 5th amendment. All of the evidence required to prove the higher offense would not be admissible in proof of the lower, while the evidence required to prove the lower offense would not prove the higher; nor at the trial of the higher offense could a verdict for a simple assault have been given under the statute. At common law the court could not direct a verdict for a misdemeanor in the trial of a felony unless "the indictment sets out the facts of an offense and charges them to have been done feloniously while in law they constitute only a misdemeanor." 1 Bishop, N. Crim. Law, Sec. 810. It is enacted in 7 W. 4, and 1 Vic. c. 85, s. 11:

"That on the trial of any person for any of the offences thereinbefore mentioned, *or for any felony whatever, where the crime charged shall include an assault against the person*, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years." Lonsdale, Stat. Crim. Law of England, 30.

"But this is now repealed by the Stat. 14 and 15 Vict., c. 100, §10, and the more general provision introduced, allowing the jury, upon all indictments for felony or misdemeanor, to acquit of the offence, and find the party guilty of an attempt to commit it." 2 Archbold, Crim. Pr. & Pl., 68.

Our statute does not authorize a verdict of an assault in a trial for an assault with intent to ravish, although, in many instances, provision is made for conviction of a less offense than is charged.

Thus in charges of assault or assault and battery or mayhem,

or with intent to murder; maim or disfigure, or with a dangerous weapon with intent to commit burglary, robbery, manslaughter or murder or other crime of such character, or of an assault by one not armed with a dangerous weapon with force and violence with intent to commit burglary, robbery or theft, or with a knife, sword-cane, or any other weapon obviously and imminently dangerous to life, or on any public officer with intent to resist, hinder or obstruct him in the discharge or execution of his duty, or of offering violence to the person of a public minister, or inflicting slight corporal injury upon another, the defendant "may be found guilty of any offense necessarily included in that with which he is charged, as the facts proved may warrant." R. L., Sec. 2918. A verdict may be given for assault and battery or for manslaughter on an indictment for murder or manslaughter. *Ib.* Sec. 2865. On an indictment for robbery, larceny or any offense of more than one degree, a verdict may be given for any lesser degree of the same offense. *Ib.*, Sec. 2866. Upon trial for robbery the jury may find an assault with intent to rob. *Ib.*, Sec. 2867. A trial for embezzlement permits a verdict of larceny, and conversely, in a trial for larceny, embezzlement may be found. *Ib.*, Sec. 2868. If upon a trial for obtaining property by false pretenses it is proved that the property was obtained in such a manner as to amount in law to a larceny, the defendant is not therefore entitled to be acquitted and shall not afterwards be liable to a prosecution for the larceny. *Ib.*, Sec. 2869. A person tried for the offense of rape or sodomy may be convicted of an assault with intent to commit the same. *Ib.*, Sec. 2873. Section 3082, *Ib.*, provides a penalty for the offense of riot or unlawful assembly having for its object the destruction or injury of any house or other structure, section 3083, *Ib.*, for a higher penalty if the riot or unlawful assembly endangers life, limb, health or liberty, but one who is indicted under this section may, by section 2876 *Ib.*, be convicted of the offense charged in the previous section. "Where any offense attempted is committed by the party making such attempt, the attempt is merged in the

offense." *Ib.*, Sec. 2718. But for the crime of rape there are no degrees and in a trial for rape a verdict can be given for no lesser offense than an assault with intent to commit rape.

Upon the ground then that at the trial on this indictment the defendant could not have been convicted either of the assault and battery for which he had already been convicted or of the assault which was a component part of that offense the indictment did not place him in jeopardy of a second conviction of the former offense or of the separate assault included therein.

There are decisions that a prosecution for simple assault is a bar to a prosecution for assault and battery or for an aggravated assault upon the same state of facts on the ground that the assault is a necessary ingredient of the other offense and that proof of the facts necessarily alleged in either case would warrant a conviction of the other. *People v. McDaniels*, 137 Cal. 192; *State v. Hatcher*, 136 Mo. 641. In such jurisdictions it appears to be held that the defendant is put in jeopardy twice if prosecuted for a greater offense after having been convicted or acquitted of the lesser offense included in the greater. Thus it is held in Alabama that "if defendant had been convicted for the assault and battery it would not for a moment be contended that he could again be tried and punished for the assault with intent to ravish." *State v. Blevins*, 32 So. 637. In *People v. McDaniels*, supra, it was held that the defendant could not be tried for assault with intent to commit murder after having been convicted and punished for the same acts charged as the offense of battery, the court after remarking that all such offenses as battery, mayhem, rape and robbery, as well as assaults with intent, necessarily include an assault, and that it is generally conceded that a conviction of the higher offense is a conviction of the assault included in it, says: "And it would seem to follow logically as well as by construction that a conviction or acquittal of any of the included offenses must bar a prosecution of the higher, since the higher cannot afterwards be prosecuted without opening the door for a second conviction of an offense for which the defendant had before been tried and acquit-

ted." The court further correctly observed: "There are numerous decisions in other jurisdictions inconsistent and even contradictory to those, and prior decisions of this court, hereinbefore cited may be admitted," citing *Morey v. Com.*, 108 Mass. 433, which held that the defendant could lawfully be tried for adultery after having been convicted of lewd and lascivious cohabitation with the same woman on the ground that the evidence to support a conviction in the former case could not have warranted a conviction in the other, the court saying: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." So *Com. v. Roby*, 12 Pick. 496, held that a conviction of an assault with intent to murder was no bar to an indictment for murder, the court, in the *Morey* case, remarking that the *Roby* case was decided "before our statutes permitted a conviction of such an assault upon an indictment for murder."

As far as we have been able to ascertain decisions of state courts which hold that after a trial for a simple assault there cannot be a trial of a higher offense which includes the assault are based either on a statute or else, as we infer, upon the adoption as common law of the statute of 7 W. 4, above mentioned, which permits a conviction for the assault in the trial of the higher offense. Bishop, *supra*, Sec. 780, says: "Where the common law rule that there can be no conviction for misdemeanor on an indictment for felony does not prevail, a person on trial for any higher one of these offenses may be convicted of any lower one which the proofs establish, if the indictment is, as it always may be made, in a form to include the lower." The author further says: "The doctrine of this paragraph is very elementary, and the authorities to it are not discordant." *Ib.* n. 1; and yet examination of the cases cited in the note show that they are based on express statutes. Citing further from this author,—“By the general and better doctrine, a conviction

or acquittal of a common assault will bar proceedings for an assault with intent to do great bodily harm, and other assaults aggravated in like manner." *Ib.*, Sec. 1058. *State v. Smith*, 43 Vt. 326, is cited in support of this statement (*Ib.* n. 4) in which the court say: "There is considerable conflict in the authorities upon this subject, but we think the rule is now well established that when one offense is a necessary element in and constitutes an essential part of another offense *and both are in fact but one transaction*, a conviction or acquittal of one is a bar to the prosecution for the other." The note, however, thus proceeds,—“Contra, when the offense as proceeded against is the less,” citing Iowa, Texas and New York cases.

In strictness both of the offenses under discussion in the present case are not “in fact but one transaction,” but we prefer to base our opinion mainly upon the fact that the two offenses are not the same in law or in fact. It is said that cases in which death occurs after the murderous assault are an exception to the rule forbidding a second trial for the same offense; that murder is not committed until the assaulted person dies, so that one who is tried for the assault during the life of the injured person is not, when indicted for murder after the assaulted person dies, tried twice for the same crime for the death “is not merely a supervening aggravation, but it creates a new crime.” *Ib.* Sec. 1059, n. 1, citing a Scotch case. But the 5th amendment makes no exception of offenses created by operation of law as a result of the commission of other offenses.

People v. Sanders, 4 Park. Cr. Cas. 196, further illustrates the effect upon a plea of former conviction of the absence of authority to convict for the lower offense, giving as a reason why a conviction for assault and battery did not bar an indictment for rape,—“the defendant cannot upon this indictment be tried or convicted of assault and battery.”

Bishop recognizes this view by including in his classification, “When, in Reason, Offences Same,” cases in which “the two indictments set out like offences and relate to one transaction, yet if one contains more of criminal charge than the other, but

upon it there could be a conviction for what is embraced in the other, the offences, though of differing names, are, within our constitutional guaranty, the same." *Ib.*, Sec. 1051. In respect however of an "Act constituting one offence and part of another," (which is precisely the case before us) that author does not agree with cases like *Com. v. Morey*, supra, *Com. v. Bakeman*, 105 Mass. 55, *Com. v. Shea*, 14 Gray 386, *Com. v. McConnell*, 11 *Ib.* 204, saying of them, "Some courts maintain that in the words of Gray, J.: 'A single act may be an offence against two statutes; and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" *Ib.*, Sec. 1062, n. 2. "By all the authorities this would not be so if the conviction was for the larger crime. And on the better reason and better authorities it would not be so if the conviction was for the smaller." *Ib.* We do not accept this last statement as law.

In *Com. v. Roby*, supra, in which the defendant had been convicted of a murderous assault before the death of the person assaulted, Shaw, C. J., in overruling the plea of former conviction, said: "In considering the identity of the offence, it must appear by the plea, that the offence charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offence charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." This case has received the sanction of the supreme courts of many of the states and we are not prepared to adopt a contrary doctrine to that which it expresses.

But it is said that a contrary doctrine is adopted by the court in *re Nielsen*, 131 U. S. 187, although the case cites with approval *Com. v. Morey*, supra, which is precisely like *Com. v. McShane*, 110 Mass. 502, in which the court said: "Keeping a tenement for the illegal sale of intoxicating liquors and thereby making the tenement a nuisance is a different offense from keeping such liquors for sale contrary to law, and the conviction of the offense last mentioned may take place, and

the proof of the same keeping may furnish proof of the nuisance."

The *Nielsen* case, *supra*, held that the defendant, having been convicted of the offense of unlawful cohabitation within certain dates, could not afterwards be tried for the offense of adultery with the same woman committed at any time during the unlawful cohabitation for which he had been convicted because "where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for some of those incidents without being twice put in jeopardy for the same offence." *Ib.* 188. The court construed the statute against polygamy, under which the defendant had been convicted, "as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives." *Ib.* 189.

In *Com. v. Morey*, the first offense was brought under a statute expressly limited to the case of a "man and woman not being married to each other," Sec. 6, Ch. 207, Pub. St. Mass.; whereas in the *Nielsen* case the statute contained no such limitation, and in the opinion of the court included the offense of adultery as one of the incidents included in the statutory offense of "cohabiting with more than one woman." In this view *Nielsen* could have been convicted of adultery at his first trial under Sec. 1035, U. S. Rev. Stat. "In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment." The court, in *Nielsen's* case, remarked of certain cases cited in Wharton's *Crim. Law*, Sec. 560, to sustain the doctrine that "a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one," that, "all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater." *Ib.* 189.

We regard the *Nielsen* case as sustaining our view of the

present case, and we do not infer that, while adopting the law in *Com. v. Morey*, it intended to repudiate the rule laid down in the principal case by Chief Justice Shaw.

We repeat that the rule that a conviction of the first offense bars a second charge, if the evidence to prove the latter would prove the first charge, implies that the evidence in the second case was admissible in the first. "If the evidence which is necessary to support the second indictment was admissible under the former, related to the same crime and was sufficient, if believed by the jury, to have warranted a conviction of that crime, the offenses are identical. 12 Cyc. L. & Proc. 280. By this rule the plea is bad, since in order to prove the assault and battery evidence of its felonious intent is irrelevant.

If the legislature should enact that a verdict for a felonious assault may be given upon an indictment for a felony then a trial and conviction or acquittal for the minor offense would bar an indictment for the other. If it be said that the constitutional safeguard against being twice in jeopardy ought not to depend upon the will of the legislature the answer is that it is mainly in respect of the offenses of abortion, seduction and assault with intent to ravish that such laws are not already made. In these exceptional cases a defendant is guilty of the whole offense including every act, whether a separate misdemeanor or not, going to constitute it, or he is innocent of the compound offense, although he may be guilty of some criminal acts involved in it. The legislature may well have thought that a conviction for simple assault ought not to negative criminal liability for the larger offenses of such enormity. If a defendant is acquitted of assault he cannot be tried for the felonious assault, not on the ground of being twice in jeopardy, but of estoppel by judgment precluding the state from again asserting against him the fact so adjudicated. Thus, "although a prosecution for rape is not barred by conviction for assault and battery," (*People v. Saunders*, *supra*; *Reg. v. Gisson*, 2 C. & K. 781, (61 E. C. L. 781), an acquittal of the assault and battery would bar the subsequent indictment; *People v. Purcell*, 16

N. Y. Suppl. 199 (12 Cyc. 288). "In other words, while a former acquittal of a minor offense is no bar, *per se*, to an indictment for the greater, yet where in the first trial, a point material to the support of the second, was fairly submitted to the jury, and a verdict found for the defendant, the prosecution is estopped thereby. But where on the first trial there was a *conviction*, this forms no impediment to a subsequent prosecution for the major offense, and to the imposition of such *additional* punishment as may be proper to complete the sentence on the double crime." Wharton, Am. Cr. L. 200. Of course it would be impossible for a defendant who did not commit the assault to commit it with felonious intent.

It was once claimed that at common law a defendant, charged with a misdemeanor, must be acquitted if the facts showed a felony and then, when held for the felony, could plead former acquittal, so that he could be convicted of neither offense because guilty of both. *Reg. v. Button*, 11 Ad. & El., N. S. 927, disposed of this claim. "A misdemeanor which is part of a felony may be prosecuted as a misdemeanor though the felony has been completed. * * * It was further urged, for the defendants that, unless this defence was sustained, they might be twice punished for the same offence; but this is not so, the two offences being different in the eye of the law."

Upon full consideration it appears to us that the plea of former conviction was correctly overruled. In the view we have taken it is unnecessary to say whether or not the defendant's first case was for an indictable offense not triable by the magistrate. If it was not triable by him the plea would be bad for that reason, if no other.

The next class of errors assigned are the following remarks and comments of the court, which the defendant claims prejudiced him before the jury. The prosecutrix, in answer to the question as to whom she met right after the alleged assault, testified,—

"Then when I was coming down, *walking down the road slowly*, I was not able to go very much further and when I was

about to sit down there and by chance I happened to look behind and saw one Japanese and he happened to be Tanaka, and when he saw me he asked me what was the matter with me, he said 'You don't look well'—

Mr. Crook. 'I object, if the court pleases, to a narrative of what he said or anything of that kind, the evidence is inadmissible.'

The Court: 'What was said on that occasion immediately after that assault is part of the *res gestae*. The witness has testified that *she started along the road*, that the defendant had left her, that she saw this man and he asked her what was the matter'—

Mr. Crook (interrupting). 'I except to the remarks of the court.'

The Court. 'I am merely giving her statement up to this point in order to show whether her statements at that point were a part of the *res gestae* or not.'

Mr. Crook. 'I note an exception to the remarks of the court as regards the evidence on the grounds that the evidence was not in those words that the evidence tended to show something that has not been brought out and tends to prejudice the rights of the defendant and to mislead the jury.'

The Court. 'The exception is overruled.'

Mr. Crook. 'I note an exception. I also take exception to the admission of the evidence—object to its going in as it has not been shown within what time—it has not been shown that it is a part of the *res gestae*, that it happened immediately'—

The Court (interrupting). 'You need not make an argument now, you have taken your exception.'

Mr. Crook. 'I want it to appear that I base my exception upon stated grounds and I want the grounds to go into the record.'

The Court: 'The matter has been overruled and that ends it.'

Mr. Crook. 'I except to the ruling of the court in not allowing me to state the grounds upon which my objection is made.'

The Court. 'You have stated them already. Do you want to embarrass the court, is that your object?'

Mr. Crook. 'I object to the statement of the court.'

A. Then he told me he was a luna.

Mr. Crook. 'I object to what he told her, the evidence of what third parties said has nothing to do with the rights of the defendant.' "

The court having refused to allow the defendant in cross-examining the witness to require her to say whether her evidence was the same which she gave against him at his trial for the misdemeanor other than to show that she made different statements in the court below, and having stated that the order of the court was that the defendant's attorney "must not bring any matter before the jury for the purpose of influencing them through a former trial" the attorney insisted upon arguing that he had a right to go fully into the evidence at the former trial, and was again informed by the court,—“You must not bring up that matter again,” adding “Every time that you undertake to interfere with the proceedings of this court to disallow something that is irrelevant to the case I shall have to stop you. If you persist in it I shall have to proceed further.” The defendant excepted to these remarks whereupon the court said: “Your exceptions may go a little too far when you push them to disobeying the direct order of the court.” The attorney then said: “I further except to the remarks of the court last made and note an exception thereto that they are prejudicial to the defendant. I further object to the overruling of the question put to the witness and further do I object to the disallowing me of stating grounds upon which the objection is founded.” The court then stated in substance that it had allowed the attorney to contradict any statement that the witness had made before the magistrate and to ask her whether she made that statement and if she said she did not that he might show the opposite, remarking: “but that is as far as you can go, but I cannot allow you to bring in persistently the fact that he has had a trial for assault as an inducement to the jury here to consider that the man is being unjustly tried—I cannot allow it,” whereupon the following appears on the record:

“‘I object.’ The Court. ‘I cannot allow it.’ Mr. Crook. ‘I object to the construction that the court has put on it.’— The Court (interrupting). ‘Let me say to you, Mr. Crook, that when the court makes an order it can enforce it and it will.’ Mr. Crook. ‘Exception duly noted.’ The Court. ‘You may

except once too often if you disobey the order of the court.' Mr. Crook. 'Further exception.'"

The prosecutrix, having testified in her further cross-examination that after the assault going along the road she held on to the wires of the fence, she could not say that she did so all along, but where she could, but there were "some places where the weeds were too high," also piles of dirt as high as her knee and a little higher, was asked,—“Well how little higher than the knee,” whereupon the court said: “Is it usual for a woman in that situation to take actual notice of how high the weeds were as she went along?” The defendant’s attorney then said: “I except to the construction of the court.” Court: “I am simply giving her statement; not giving any construction.” Attorney: “I except as being prejudicial to the defendant in this case, as drawing a presumption against him and laying greater weight to the corroborating evidence.” Court: “I have a right to limit the cross-examination where I think it is in justice, and the idea that a woman in (such a) situation could have paid strict attention to the height of the weeds all the way is not in my judgment to bring out the main points at all.” Attorney: “Exception on the same grounds.”

Further in the cross-examination the same witness testified, in reply to the question,—how far mauka of the railroad crossing this transaction occurred, that: “there were eight telephone posts between” and further, in reply to the question, “then it was not as far as you testified on direct examination,”: “I said first that it was about to the flume over there in the field.” Then:

“Q. ‘Then you corrected yourself and afterwards referred to the second telephone post up the road?’ The Court. ‘Isn’t that a question of distance?’ Mr. Crook (interrupting). ‘I except to the remarks of the court.’ The Court. ‘I am endeavoring to hold you to the essentials of the case. It is the business of the court to have the merits of the case presented to the jury, and not to fly off on distance and on grass and on this and on that and the other. I claim the right to limit the cross-

examination to essentials rather than to nonessentials.' 'Exception.' "

The claim of the defendant that the court in stating that the witness said she *started along the road*, instead of *walking down the road* gave in the presence of the jury a wrong construction of the witness' language which was prejudicial to the defendant, does not seem to us to have weight. The further remarks of the court to which the defendant excepted were well within the province of the court, whose duty it is "to confine counsel to the evidence and keep them within the boundaries of legitimate argument" as well as of proper cross-examination. 21 Encyc. Pl. & Pr. 996. It may be neglect of judicial duty to allow counsel to get before the jury the results of a former trial. 2 Ib. 734. New trials are sometimes granted for allowing counsel, after having been checked by the court, to proceed unduly in an improper line of argument before a jury. Ib. 750.

It appears to us that the defendant's attorney by his apparently intentionally offensive manner towards the court justly merited all the admonition which the court administered to him. We are inclined to think that the remark of the court that "the idea that a woman in her situation could have paid strict attention to the height of the weeds, is not in my judgment to bring out the main points at all," comes within the statute that "the judge presiding at any jury trial (hereafter in this chapter named the court), shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude appearance, motive or reliability of any witness sworn in a cause." Sec. 1798, R. L.

We do not think, however, that the remark of the court concerning this testimony, although perhaps open to criticism, is likely to have affected the result or requires a reversal of judgment. If the statute required, as we do not think that it does, a reversal of judgment for any comments whatsoever made by the court upon the evidence, then it would be requisite to consider whether the statute is constitutional in limiting the right

of a common law trial by jury. The U. S. Supreme Court has frequently held in reference to suits at common law under the 7th amendment, that trial by jury requires the superintendence of a judge empowered to instruct them on the law and to advise them on the facts." *Capital Traction Co. v. Hof.*, 174 U. S. 14. See also: *Nudd, et al., v. Burrows*, 91 Ib. 439; *Vicksburg &c. R. Co. v. Putnam*, 118 Ib. 553; *U. S. v. Reading R.*, 123 Ib. 114

The importance of the question whenever it shall require decision is obvious.

The defendant claims error in the court allowing the prosecutrix to testify as to whom she met directly after the assault and to repeating the conversation between herself and that person, citing many decisions in support of his contention that the practice is "to ask the witness if she made complaint and to receive in answer a simple 'yes' or 'no,' her evidence being merely corroborative of her testimony and not evidence of the fact upon which the jury can find the defendant guilty." This was the early doctrine. *Rex v. Clarke*, 2 Stark. N. P. Cas. 242.

In *Regina v. Walker*, 2 M. & R. 212, Parke, B., said: "For reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her."

In several jurisdictions, as in Connecticut and Ohio, for instance, the courts, while recognizing the early English rule, refused to adopt it. *State v. Kinney*, 44 Conn. 153, citing the English cases.

"In some jurisdictions it is held that only the fact of the complaint should be admissible in the first instance. In other jurisdictions it is held that not only the fact of the complaint should be admitted, but also the full details and particulars of the statement as made should be received in evidence." 1 Elliot, Evidence, Sec. 566.

The early doctrine is now discarded in England. *Regina v. Lillyman*, 11 L. R. Q. B. 167.

The fact that the complaint was seasonably made is not allowed to be shown because it is part of the *res gestae* but rather as an exception to the rule excluding hearsay evidence. There is no reason why, if the complaint itself is admitted, the entire conversation should not go in. We think it ought to be admitted and in this case was properly allowed.

We see no ground for reversing the judgment by reason of the restrictions placed by the court upon the cross-examination of the prosecutrix as to the locality of the alleged offense and its distance from a certain other place; nor by reason of the testimony allowed by the court in the redirect examination of the witness to the effect that "there were no people around there at the time when she first met the defendant;" that in "walking along the road" (she in her direct examination having said, "down the road") she "took the outside path" and that there "was a barbed wire fence only part of the way" and that she went "closer to B.'s house."

The defendant waived in oral argument assignments of error numbered 15, 16, 17, 28 and 29. The remaining errors assigned concern instructions refused and given.

Without reciting the elaborate phraseology of the instructions refused, it is sufficient to say that they amounted to instructions that the jury, in order to convict, "must be satisfied, beyond a reasonable doubt, from the evidence, that the defendant assaulted the prosecuting witness with the intent at the time to overcome any and all resistance which might be offered by her," and that if the jury had any reasonable doubt from the evidence whether the defendant "intended to accomplish his purpose by such force and to overcome by violence or fear any force such as the prosecuting witness might have been capable of offering to resist him," or "that if he assaulted her only with the design to accomplish his purpose if he could get her consent, * * * the act would only amount to an assault, or an assault and battery, and the jury should acquit." Another instruction was asked covering the same ground.

The further instruction asked by the defendant and refused by the court was to the effect that unless every juror believed the defendant guilty it was improper that a verdict of guilty be returned "though the majority should so believe and in such an event it is the duty of the juror or jurors not so convinced to refuse to join in a verdict of conviction."

We think these instructions were properly refused in view of the instructions which were given.

The question of proving the intent with which an act was done has received the consideration of this court in several cases.

"It is well settled, however, that the intent need not have been shown by direct proof. What is passing in the human mind is rarely to be proved by direct evidence. The law does not require impossibilities. * * * Nor need the intent be shown by direct and positive testimony, as it may be inferred from circumstances. *Com. v. People*, 116 Ill. 458. 'Specific proof of intent is not essential, but the intent may be proved by the evidence of the attending facts and circumstances.'" *Lo Toon v. Territory*, 16 Haw. 353.

The same view was expressed in *Territory v. Wright*, Ib. 137.

The following instructions upon the matter of intent, to which instructions the defendant excepted, were correctly given:

"The defendant in this case is charged with assault with intent to rape upon a Japanese woman Riki Nomura. If you find from the evidence, beyond a reasonable doubt, that the defendant did upon the day in question make an assault upon her with intent then and there and against her will and consent and by force to have sexual intercourse with her, then your verdict should be guilty as charged."

"It is impossible for one to look into the mind of another to ascertain the intent that exists therein, so therefore, in arriving at the intent with which an act is committed, you must take into consideration all the facts and surrounding circumstances existing at the time of the commission of the alleged offense, and if you find from the evidence, beyond a reasonable doubt, taking into consideration all the facts and circumstances as shown by the evidence, that the defendant did, upon the day in question, make an assault upon the woman Riki Nomura,

with intent to have sexual intercourse with her, and that intent was against the will and consent of the woman then your verdict should be guilty as charged."

"I further instruct you, gentlemen of the jury, that if you find from the evidence, beyond reasonable doubt, that it was the intention of the defendant at the time he made the assault in question, if you find that he did make an assault, to have sexual intercourse with a woman by force and violence and that it was against the consent of the woman, and if you further find that the defendant subsequently abandoned his intention and did not consummate the offense still he would be guilty of the offense charged in the indictment, if you find from the evidence beyond a reasonable doubt, that he made the assault in question with intent to ravish her."

"I instruct you that if you find from the evidence beyond a reasonable doubt, that the defendant, at the time of the commission of the alleged assault, had an intent to have sexual intercourse with a woman, Riki Nomura, by force and against her will, the mere fact that he did not accomplish his purpose, if you find that he had such a purpose, would not release him of criminal responsibility."

The court in its charge read to the jury the statute concerning the alleged offense and instructed them that if they believed, beyond a reasonable doubt, that it was committed as alleged in the indictment they should convict, adding on the subject of the testimony of the complaining witness:

"Although a man cannot be convicted upon the uncorroborated testimony of the prosecutrix herself still the law allows evidence to be offered in support of her testimony, that she made complaint after the alleged assault, and if you find from the evidence in this case, beyond a reasonable doubt, that she did make complaint of the assault in question as soon thereafter as was practicable, then her complaints are in the nature of corroboration and are not hearsay testimony as the term is ordinarily meant," and

"Her testimony alone is not sufficient to convict without corroborating evidence and if you find that she complained of the assault as soon as she had opportunity that would tend to corroborate her evidence of the assault, and if you find that the assault was made as charged and that her miscarriage was in consequence of the assault, then such a result might also be con-

sidered as corroborative testimony for the prosecution. If you find from all the evidence that the alleged assault was begun by the defendant with the intent to forcibly ravish the prosecuting witness without her consent and against her will, but that in case he desisted and did not fully carry out his intention so to ravish, still under our statute, if he committed any act or violence toward her in execution of such intent to rape her, he should be convicted of the offense as charged. In judging of his intent you will take into consideration all the circumstances which in your minds have been proved by the evidence in the case beyond a reasonable doubt. On the other hand, if, upon the evidence you believe the defendant's testimony denying the alleged assault and that he accidentally ran his bicycle against her causing her to fall to the ground, that he raised her up apparently uninjured and she went on her way; that he neither assaulted her nor in any wise intended to assault her, as charged in the indictment,—if you find this to be true you should acquit.

“To sum up the charge in a few words,—if you believe, beyond a reasonable doubt, the testimony of Riki Nomura, and that it is corroborated by the complaint she made and by her miscarriage, you should convict, but if upon all the evidence you believe the testimony of the defendant, you should acquit.

“If you have a reasonable doubt of his guilt he must have the benefit of the doubt and be acquitted.”

The case was properly presented by the court to the jury. It was unnecessary explicitly to charge them, as requested by the defendant, concerning the duty of jurors not convinced of the defendant's guilt to refuse to join in a verdict of conviction.

We find no error in the record and therefore affirm the judgment of the circuit court. The case is remanded accordingly.

M. F. Prosser, Deputy Attorney General, for the Territory.
A. H. Crook for defendant.

DISSENTING OPINION OF FREAR, C.J.

The principal question is whether a conviction of assault and battery is a bar to a subsequent prosecution for assault with

intent to commit rape, the transaction being the same in both cases. The provision of the federal Constitution that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" and the decisions of the federal supreme court control, so far as they go. That court, as I construe its decision in the case of *Nielsen*, 131 U. S. 176, has adopted a principle which requires us to hold that the plea of former conviction should be sustained in the present case. If our statutes are not as broad as the Constitution in this respect, so much the worse for the statutes; if they are broader, so much the better for the defendant.

The *Nielsen* case, indeed, as will appear below, goes further than we are required to go in this case in order to sustain the plea. Moreover, the question is even simpler than as above stated. A reflection or two will show that it may be so simplified that to ask it is to answer it in the affirmative. For, since our statutes permit a verdict of assault alone as well as of assault and battery under a charge of the latter, there was, as everywhere held, jeopardy of the assault as well as of the combined assault and battery, whether there was a conviction or an acquittal, and therefore the element of battery may be eliminated; the same result follows in this particular case, irrespective of the statute, because the defendant was in fact convicted of the assault and battery, and, as also everywhere held, such conviction was a conviction of the assault as well as of the battery. Therefore, the question narrows to this at least, whether a conviction of assault alone bars a subsequent prosecution for the same assault with a particular intent. To go a step further, the object of the prosecution for the assault with the particular intent was to obtain a conviction, and since a conviction of an assault with a particular intent is a conviction of the assault as well as of the combined assault and intent, just as a conviction of assault and battery is a conviction of the assault as well as of the combined assault and battery, it follows that to allow the defendant to be convicted of the assault with intent to commit rape would be to allow him to be convicted a second time of

the identical offense of which he had already been convicted, namely, the assault pure and simple. This opinion might well end here but for the fact that a question of important constitutional right is involved and the intricacies of the law upon this subject are such as to require a fuller statement in order to meet what at first impression might seem plausible reasoning for an opposite conclusion.

It goes without saying that in order to be the "same offense" the offenses must be the same in both law and fact. It is obvious that such is the case here, for the assault in both the assault and battery and the assault with intent to commit rape is the same act in fact and the same offense in law. As said in *Bell v. State*, 103 Ga. 397 (30 S. E. 294), in which a conviction of assault and battery was held a bar to a prosecution for assault with intent to commit rape, "as a matter of law and of fact, assault is always a part of such crime" (assault with intent to commit rape). But, though this test seems clear enough in this particular case, where the offense (assault) has the same name in law as well as being the same act in fact in both prosecutions, it is after all a generality—a mere statement in different form of the constitutional provision—which does not always assist much, for the question still remains, what offenses are the same in law and fact. A number of rules have been adopted for the purpose of determining this.

What is said to be the rule most generally applied is that the facts set forth in the second indictment must be such as would if proved warrant a conviction under the first indictment. "The number of instances in which in almost every jurisdiction this test has been recognized or applied renders the citation of all these cases impossible, and but a few from each jurisdiction will, therefore, be given." Note to *People v. McDaniels*, 137 Cal. 192, in 92 Am. St. Reps. at page 105, citing a page of cases in support of this rule. This note of seventy pages contains the most careful as well as the most complete review of the law and the cases on this subject that has come to my notice. See also, to the same effect, 12 Cyc. 280, and 17 Am. & Eng.

Enc. of Law 597, each citing numerous cases. Under this rule also the present plea in bar is good because the facts alleged in the second indictment would warrant a conviction of the assault, if not the battery, under the first indictment or complaint. At page 598 of the authority last mentioned, the rule is stated in different language as follows, the parts in parentheses being mine: "The rule that the doctrine only applies where the two prosecutions are for the same crime must be taken with this qualification, that where one crime (assault) is included in and forms a necessary part of another (assault and battery) and is but a different degree of the same offense (assault and battery), and where on a prosecution for the higher crime (assault and battery) a conviction may be had (as under our statutes) for the lower (assault), then a conviction or acquittal for the higher (assault and battery) will bar a prosecution for the lower (assault) or for any crime (assault with intent to commit rape) of which the lower (assault) is an essential ingredient." Some cases, as, for example, the *Nielsen* case, go further and hold the same even when there could not be a conviction of the lower (assault) on a prosecution for the higher (assault and battery). This rule, however, though infallible as to all cases to which it applies, and applicable to most cases of this nature, is not applicable to all cases, for in some cases there may have been jeopardy for the same offense if the facts alleged in the first indictment are such as would if proved warrant a conviction under the second indictment, and under some circumstances even if the facts alleged in either indictment would not authorize a conviction under the other. This is generally recognized.

Another rule is that the offenses are the same if the transaction is the same. But this is not always a correct test, for the same transaction may constitute more than one offense in law. For instance, a sale of intoxicating liquor without a license to an intoxicated minor on Sunday might constitute the different offenses of selling without a license, selling to a minor,

selling to an intoxicated person and violating the Sabbath. Such offenses are entirely different in their character; and the common element, selling, is not in itself an offense. No one of these offenses necessarily includes any other, nor do any two include a common third offense.

The rule adopted by the majority of the court in this case is that there has been no jeopardy for the same offense unless the law permits under the second indictment a conviction of the offense, or some offense included in the offense, charged in the first. Under this rule it is immaterial that one offense is included in the other or that both offenses include the same third offense, or that the facts necessarily alleged in, or the evidence necessary to support, the second indictment would warrant a conviction under the first, or that the transaction was the same, so long as under the second indictment there cannot be a conviction of the offense, or a common included offense, charged in the first. Undoubtedly, if under the second indictment there may be a conviction of the offense charged in the first, a conviction under the first is a bar to a prosecution under the second, but the converse, which is the rule of the majority of the court, is a very different thing. Indeed, the majority reverses not only this but also the rule above set forth as the one almost universally held, namely, that the offenses are the same if the facts in the second indictment would convict under the first; for, as I construe its decision, it holds in effect that the facts in the first indictment must be such as would authorize a conviction under the second or that the facts in the second must warrant a conviction under the second of the offense charged in the first. It must, moreover, logically go still further and hold that the facts in *each* indictment must warrant a conviction under the other; for, the doctrine of former jeopardy implies two jeopardies, and, therefore, to illustrate, if there is no jeopardy for assault under a prosecution for assault with intent to commit rape unless there can be a conviction of the assault alone, there can also be no jeopardy of assault under a prosecu-

tion for assault and battery unless there can be a conviction of the assault alone, and consequently if the law did not permit a conviction of the assault alone under a prosecution for assault and battery and there was therefore no jeopardy for the assault, there could be a subsequent prosecution for the assault with intent to commit rape even though there could be a conviction of the assault alone under that charge—which would be startling. If the rule of the majority is correct, many of the questions arising out of this subject that have perplexed courts could easily be solved by a reference to the statutes; and legislatures, by not permitting convictions of included lesser offenses under charges of greater ones, could, in spite of the constitutional guaranty, permit a person to be prosecuted, convicted and punished successively for many offenses of different degrees or grades though of the same general character and comprised in the same transaction. For instance, in so far as convictions might happen not to be permitted of one of the following offenses under a charge of another, there might be successive prosecutions and convictions of simple assault, assault and battery, assault with intent to ravish, assault with intent to rob, assault with intent to kill, manslaughter, murder, etc., etc., though only one act was committed. Again, under the majority rule, the offense first charged would always have to be either the same as or greater than some offense for which there could be a conviction under the second charge, and the majority even state, in substance, in its endeavor to reconcile with its rule the rule above stated as the rule generally applied, that the latter rule requires that all the evidence necessary to support the second indictment must be admissible under the first indictment; for example, that it is not sufficient that part of the evidence necessary to prove a charge of assault with intent to commit rape would be sufficient to convict of assault under a charge of assault and battery, but that all the evidence, including that showing the intent to commit rape, must be admissible under the charge of assault and battery in order to prove the assault; in other words, that a conviction of a lower offense cannot be a

bar to a prosecution of a higher offense. If that is so, then the vast majority of cases, of which several are cited in the majority opinion but which they decline to follow, are incapable of explanation except on the theory that they are wrong. See authorities *supra*; also 1 Bish., New Crim. Law, Sec. 1057, from which I quote the following: "A jeopardy of the highest is equally a jeopardy of the lowest. And since the government confessedly cannot begin with the highest, and then go down step by step bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result. Some apparent authority, therefore, English and American, that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle. And even in authority, the doctrine which holds it to be a bar is sufficiently established in general."

Courts have applied the rule of former jeopardy liberally with a view to preventing persecution. For instance, the constitutional guaranty is in terms limited to jeopardy of "life or limb," thus preserving the language of times when nearly all offenses were punishable with death or dismemberment, but it is construed as stating a principle rather than a rule and so under present conditions is extended to jeopardy of liberty as well. It is now also, as already stated, almost universally held that it is immaterial which offense is prosecuted first when they are of different grades and the greater includes the less. A conviction of the greater bars a prosecution for the less, whether there could be a conviction of the less or not under the same indictment, because the great includes the less and a conviction and punishment for the greater is a conviction and punishment for the less. It is equally true that a conviction or acquittal of the less bars a prosecution for the greater, for the acquittal of the less shows that the defendant could not have committed the greater and the conviction of the less cannot be repeated in a conviction of the greater. It is reasonable to hold that an acquittal of the greater, when no conviction for the less could be had under the same indictment, does not or might not bar a

prosecution for the less, but it is different with a conviction. For instance, there might well be successive prosecutions for assault with intent to ravish, intent to murder, intent to rob, etc., so long as there were acquittals because of failure to establish the particular intent, if there could be no conviction and therefore no acquittal of the assault alone without the particular intent, but a conviction of any one of these offenses ought to bar a prosecution for the others whether there could be a conviction of simple assault under the same indictment or not. In the present instance the defendant has been convicted of the assault (included in the assault and battery) and under the statute he might have been either acquitted or convicted of the assault alone if the battery had not been proved. He ought not to be again put in jeopardy of imprisonment for the same assault merely because he made it with a particular intent. The Territory had its election as to which charge it should prosecute first and having made its election and obtained a conviction, it should not be permitted to pursue the defendant a second time for the same assault under the other charge. The majority of the court, as it seems to me, do not attach sufficient weight to either the fact that on the first charge the defendant could under the statute have been (acquitted or) convicted of an essential element, which was an offense itself, in the second charge or the fact that, even if there were no such statute, the defendant was convicted (not acquitted) of the first charge, which included the essential element, an offense itself, in the second charge.

The doctrine of former jeopardy is not identical in all respects with that of former acquittal or conviction, although the two are based to a large extent upon the same principle and are often confused. Former jeopardy, of course, may have occurred whether there was an acquittal or conviction or not. Former acquittal or conviction involves to some extent the law of *res judicata*. If under a charge of either assault and battery or assault with intent to commit rape there could be a verdict of assault alone it is obvious that either an acquittal

or a conviction under either charge would bar a subsequent prosecution under the other. If, however, as is the case under our statutes, there could be a conviction of assault under the charge of assault and battery but not under the charge of assault with intent to rape, an acquittal under the latter would not or might not bar a prosecution under the former, for such acquittal might have resulted from the absence of the intent to commit rape and not from failure to prove that the defendant committed the assault and so might be entirely consistent with a conviction of assault or assault and battery; but a conviction of the assault with intent to commit rape would bar a prosecution for the assault and battery, for the conviction would be for the assault included in the assault with intent as well as for the assault with intent, and to punish the defendant for the assault and battery also would be to punish him twice for the same assault. Either an acquittal or a conviction under the charge of assault and battery, however, would bar a prosecution for the assault with intent to commit rape, for the acquittal would be an acquittal of the assault as well as of the assault and battery, and of course the conviction would be a conviction of the assault as well as of the battery. Accordingly, a correct test, as far as it goes, and one which is applicable to the present case, is that where the transaction is the same and constitutes two different offenses which have in common an essential and principal element which is itself an offense, a *conviction* of either greater offense (or a conviction or acquittal of the common included offense) bars a subsequent prosecution for the other greater offense (or for the included offense), even though a conviction of such included offense alone is not permissible under the statutes upon a prosecution for either greater offense, and although an *acquittal* on a prosecution for either greater offense would not or might not constitute a bar to a subsequent prosecution for the other greater offense (or for the included offense). In the present case, as already stated, the transaction was the same; the defendant was convicted of the assault and battery, that is, of the assault as well as of the battery, and therefore cannot be

prosecuted for the assault with intent to commit rape, which includes the same assault.

This is the principle, as I understand it, upon which the *Nielsen* case above referred to was decided, though in that case strictly speaking the included common essential element did not itself constitute an offense. It is true there was a federal statute to the effect that in all criminal cases the defendant might be found guilty of any offense necessarily included in that with which he was charged, but that statute not only was not referred to by the court but was not applicable to that case. The decision was based on general principles. The question was whether the defendant could be tried for adultery after a conviction of unlawful cohabitation. It was held that the conviction was a bar because an essential and principal ingredient (sexual intercourse) of adultery was included in the unlawful cohabitation, although neither the facts required to be alleged in the indictment for the unlawful cohabitation nor the evidence necessary to sustain the indictment would authorize a conviction of adultery or of that essential ingredient, which was not itself an offense. Indeed, as stated in 17 Am. & Eng. Enc. of Law 599, under neither indictment could there have been a conviction of the offense charged in the other or of the common essential element, for sexual intercourse or fornication was not an offense under the federal statutes, and proof of marriage was necessary under one charge and not under the other, and proof of a single act of intercourse was sufficient under one and not under the other. The court cited with approval the statement in *Morey v. Commonwealth*, 108 Mass. 435, to the effect that a conviction of being a common seller of intoxicating liquors would, although an acquittal would not, bar a prosecution for a single sale—which is in line with the rule above referred to as the correct general rule—but in regard to the actual decision in the *Morey* case, which was that a conviction of lewdly and lasciviously associating and cohabitating did not bar a prosecution for adultery, the court expressed the view that that (the *Morey*) case was distinguishable from the case then under consideration

on the ground that sexual intercourse was not an essential ingredient of lascivious cohabitation, as it was of unlawful cohabitation, but added, "be that as it may, it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense." The court also, after quoting passages from Wharton on Criminal Law, which seem at first view to point in the opposite direction, distinguished between cases in which a conviction of a less crime might be had on a prosecution for a greater, and cases in which a conviction for the less could not be had under a prosecution for the greater, as follows: "It will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. *But where a conviction for a lesser crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar.*" The court then by way of illustration referred with approval to the "much cited" case of *State v. Cooper*, 13 N. J. L. 361, in which it was held that a conviction of arson would bar a subsequent prosecution for murder which was the result of the arson. Both the New Jersey case and *Nielsen* case go further than we are required to go in the present case, for in the present case not only could there be a conviction of the common lesser offense under the first prosecution but the two greater offenses necessarily in law as well as in fact and as necessarily shown on the very face of the indictments and by the very names of the offenses possess a common element or ingredient (assault) which also is an offense in itself. The very fact that there may be a difference in the result according as there is an acquittal or a conviction,

as recognized in both the *Morey* and *Nielsen* cases, shows that the possibility or impossibility of conviction of the same or an included offense under either charge is not a universal test, for when there is such possibility of conviction it is immaterial, as shown above, whether there was an acquittal or a conviction.

The majority of the court attempts to show that the court in the *Nielsen* case did not intend to hold contrary to the *Morey* case, and relies principally on the *Morey* case and on *Commonwealth v. Roby*, 12 Pick. 496, and *People v. Saunders*, 4 Park. Cr. Cas. 196, and declines to follow a number of cases which it refers to as holding differently.

As to the *Nielsen* case, I have shown that its decision as well as its unequivocal statement of the law is against the view of the majority in this case, and that, while it approved certain statements in the *Morey* case, which were in line with the general rule above contended for, it distinctly said that the decision itself, upon which the majority now rely, but which, in my opinion, does not support them, was either not applicable or, if it was applicable, that it was erroneous. Indeed, the *Morey* case was, as the court said in the *Nielsen* case, the principal case relied on for the prosecution, but the court decided against the prosecution.

As to the *Morey* case itself, enough was said in the *Nielsen* case. But I may add that that case, as I understand it, is not at all inconsistent with my views in this case.

As to the *Roby* case, which, I understand, is the one most relied on by the majority, many things may be said, but these will suffice: As to its actual decision, it was correct, for it was that a conviction of assault with intent to murder does not bar a subsequent prosecution for murder when the person assaulted does not die until after the defendant has been convicted of the assault. In such case there is no offense of murder and therefore there can be no prosecution for murder, until after the conviction of the assault. Such a case is always regarded as an exception to the general rule above stated that it is sufficient if the facts in the second indictment would if proved warrant a

conviction under the first, and the *Roby* case itself is one of the principal cases that are usually cited as coming within the exception and not the rule. It is so referred to by text writers, other courts and the same court that decided it. See 1 Bish. New Cr. Law, Sec. 1059; Note, 92 Am. St. Reps. 140; 17 Am. & Eng. Enc. of Law, 600; 2 Van Fleet, Form. Adj. 1218; *State v. Littlefield*, 70 Me. 458; *Commonwealth v. Evans*, 101 Mass. 24. This is an exception of the kind that proves the rule. As to the reasoning, apart from the decision, in the *Roby* case, the court expressly stated the rule I contend for to be the correct rule and proved it in a very satisfactory manner, by reasoning, illustrations and citations. But when it came to apply it, it expressed itself rather ambiguously. It cannot be denied, however, that the court used some language to the effect that the evidence under the second indictment would not justify a conviction under the first. If by that it meant that there could be no proof of the murder at the trial of the assault, because there had been no murder up to that time, it was correct; but if it meant that as a general rule the evidence which would prove murder would not, so far as necessary, be admissible or sufficient to justify a conviction under a charge of the assault that resulted in the murder, it was wrong, as stated in effect in *Van Fleet*, ubi supra, and held in numerous cases. What the court evidently meant was that, as it said, murder and assault with intent to murder were "offenses distinct in their nature, of a distinct legal character. * * * The facts are essentially different, and the legal character of the crime (murder) essentially different" and it based this conclusion partly on the ground that the death occurred after the conviction of the assault and partly on the old doctrine of the merger of a misdemeanor in a felony, of which more will be said below. But, as shown above, the first of these grounds brought that case within a well established exception to the rule, and so the case supports my view, inasmuch as the present case is within the rule and not the exception; and, as to the second ground, likewise, since the doctrine of merger, as correctly held by the majority of the

court in the present case, does not obtain in this jurisdiction, we are obliged to come to the opposite conclusion and hold as I do here. The doctrine of merger has now been held to be abolished by statutory implication in Massachusetts also, and of course the *Roby* case would not now be followed there. See the *Morey* case, *supra*, and cases *infra*.

As to the *Saunders* case, in which it was held that a conviction of assault and battery did not bar a prosecution for rape, which is not precisely like the present case, the decision was based in part on various views now generally considered unsound and on the doctrine of merger, which, as already stated, does not hold here. In *State v. Shepard*, 7 Conn. 54, on the other hand, where, as here, the doctrine of merger does not exist, it was held that a conviction of assault with intent to commit rape would bar a prosecution for rape. And in Massachusetts, where the *Roby* case was decided, it is held, now that the doctrine of merger no longer obtains there, that on a charge of either rape or assault with intent to commit rape there may be a conviction of a simple assault. *Com. v. McCarty*, 165 Mass. 37; *Com. v. Creadon*, 162 Id. 466. Of course under statutes such as they have in Massachusetts and most other jurisdictions, a conviction of assault and battery would bar a prosecution for assault with intent to commit rape, but this is equally true on sound principle in the absence of such statutes. In addition to the Connecticut case, *supra*, the following cases support this view, all of them having been decided on general principles, irrespective of statutes. In *State v. Blevins*, 134 Ala. 213 (32 So. 637), it was held that a jeopardy of conviction, though the case was not prosecuted to conviction, under a charge of assault and battery, barred a prosecution for the same assault with intent to commit rape. The court said, among other things: "If the defendant had been convicted for the assault and battery, it would not for a moment be contended that he could again be tried for the assault with intent to ravish." The same was held in *Bell v. State*, the Georgia case cited in the early part of this opinion. In *State v. Smith*, 43 Vt. 324, it was held that a con-

viction of assault with intent to commit rape would bar a prosecution for rape. In *Com. v. Arner*, 149 Pa. St. 35, it was held that jeopardy of a conviction of fornication barred a prosecution for rape. These cases were decided on the broad principle that, to quote from the case last cited, "a verdict of acquittal or conviction on an indictment for the minor offense, is a bar to a trial on an indictment for a crime which includes it."

This brings me to my last point—under which, by the reasoning of the majority opinion itself, it should have come to the opposite conclusion. That opinion is based on the view that under an indictment for assault with intent to commit rape there could not be a conviction of assault because the statute did not expressly permit it. If that view is erroneous, as I will endeavor to show it is, the reasoning based on it requires the opposite conclusion. In many states there are such statutes and they are often referred to by the courts. In others it is stated that there may be convictions of lesser included offenses under indictments of greater offenses, but without referring to statutes. In others, it is stated that there can be no such conviction in the absence of statute where the less offense is a misdemeanor and the greater a felony—in other words, where the doctrine of merger prevails, as it does not here. Under that doctrine a misdemeanor utterly disappears in the felony, just as a life estate in property disappears and no longer has any existence when it unites with the fee in the same person. Thus, if on a trial for misdemeanor the evidence showed a felony there could be no conviction, because there was no misdemeanor; and if the evidence did not show a felony and there was a conviction of the misdemeanor it would not bar a prosecution for the felony, because if there was a felony in fact there could have been no misdemeanor and therefore no legal conviction of a misdemeanor. So, on a charge of felony, if the evidence showed only a misdemeanor, no conviction could be had of the misdemeanor because a misdemeanant at common law was entitled to certain privileges which felons did not have, such as the right to counsel, a copy of the indictment and a special jury. 20 Am.

& Eng. Enc. of Law, 2nd Ed. 602. But the grounds for these distinctions no longer exist, and the doctrine of merger has been generally discarded by statute or judicial decision. Id. 604. Even at common law there was nothing to prevent a conviction of an included felony under a charge of a greater, or an included misdemeanor under a charge of a greater, though there could be no conviction of a misdemeanor under a charge of a felony. Id. 607. Consequently, at common law except as between felonies and misdemeanors, and now in all cases in jurisdictions where the doctrine of merger has been abrogated, there may be a conviction of any included offense under a charge of the greater where the allegations are so drawn as to cover the included offense. This is not because of statutory authority but because the less as well as the greater offense is charged. It is unnecessary to name the offense. The allegations determine what it is. What is not proved may be regarded as surplusage. The effect of statutes, which are relied on by the majority of the court, is merely to abolish the doctrine of merger as between felonies and misdemeanors. That doctrine being out of the way, there is nothing to prevent a conviction of a misdemeanor under a charge of a felony just as there is nothing, where that doctrine is held, to prevent a conviction of a less felony or misdemeanor respectively on a charge of a greater. Here in Hawaii, the doctrine of merger having never obtained, no such statute is necessary and in many jurisdictions that doctrine has been abolished by judicial decision. Allegations sufficient to show an assault with intent to commit rape necessarily show an assault. Therefore there could be a conviction of the latter on a charge of the former. Since the opinion of the majority depends entirely on the view that there cannot be a conviction of assault under a charge of assault with intent to commit rape in the absence of a statute expressly permitting it, then, if, as I believe, that view is erroneous, their reasoning requires the opposite conclusion. That no statute is necessary where the doctrine of merger does not hold, see the Connecticut, Alabama, Georgia, Vermont and Pennsylvania

cases, *supra*, and, in general, 1 Bishop, New Cr. Proc., Secs. 416-419; 1 Bishop, New Cr. Law, Secs. 780, 794, 795, 804-808; 2 Id. Sec. 56.

In view of the opinion of the majority of the court it will be unnecessary for me to express an opinion as to whether, aside from the question of identity of offenses, the alleged former conviction is not a bar on the ground that there was no former jeopardy because, as contended, assault and battery was at the time of such conviction an infamous offense and therefore beyond the jurisdiction of the district magistrate who tried that case.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND
WILLIAM O. SMITH, TRUSTEES, v. THE TERRI-
TORY OF HAWAII.

ORIGINAL.

ARGUED DECEMBER 18, 1905. DECIDED JANUARY 3, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TERRITORY—action against for its breach of agreement made in 1849, between the Hawaiian government and American Board.

This court has jurisdiction of an action of assumpsit by the successors of the American Board of Foreign Missions brought upon a breach by the Territory of an agreement made between the board and the Hawaiian government in 1849.

Id.—agreement—construction of—new term not added by acts of parties.

A transfer was made by the American Board to the Hawaiian government of the Lahainaluna school property on condition that "the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by

the mission," etc., and that in case of nonfulfilment of the condition the sum of \$15,000 should be paid. From the date of the transaction until 1903, religious instruction continued to be taught at the school as previously, both parties appearing to regard such instruction as required by their agreement. Held: the express agreement does not require that the specified instruction should be given, and the terms of the agreement being clear and unambiguous the practical construction which the parties have made does not introduce a new term in the agreement.

The school was changed by the Territory to a technical school under the name of the "Lahainaluna Agricultural School." Held: this is not a breach of the agreement to continue the institution for the cultivation of sound literature and solid science.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiffs claim of the defendant the sum of \$15,000 for its breach of agreement under the following circumstances:

In 1849, the Hawaiian government, at the suggestion of the American Board of Commissioners for Foreign Missions, took the Lahainaluna school property on the Island of Maui, which consisted of a claim of the board, then withdrawn, for a Land Commission Award for the land used by the school and the school buildings, library and philosophical and other apparatus which were burned in 1862 and replaced by the government. A letter of April 25, 1849, from W. P. Alexander, C. B. Andrews and S. N. Castle, a committee of the Hawaiian Mission representing the board, to Richard Armstrong, Minister of Public Instruction, expressed the condition on which the transfer was made to be as follows: "That the said institution *shall be continued* at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed." A further proviso was expressed in the letter that "in case of nonfulfillment or violation of the conditions" the property should revert to the mission, or, as modi-

fied by the government, it might at its option pay the sum of \$15,000, and if it should divert the establishment to other purposes than those of education it would "sustain an institution of like character and on similar principles in some other place on the islands, or pay the sum of \$15,000."

The plaintiffs contend that the expressed agreement meant not only that the government should not teach nor allow the teaching of any religious doctrines contrary to the specified confession of faith, but that it should require those doctrines to be taught. This contention is based upon the facts averred in the petition that the American Board in 1835 obtained the Lahainaluna premises from the Hawaiian chiefs for a school, the purpose of which was to introduce and perpetuate the Christian religion and to educate young men to become assistant teachers of religion, meaning that they should be educated in accordance with the tenets of the Calvinistic creed which then prevailed at the Andover Theological Seminary; that the school was established in 1831 and until 1849 carried on by the board in strict accordance with its purposes as above expressed, all of which was perfectly understood and appreciated by Richard Armstrong, to whom the letter of the committee was addressed, and by the other members of the Hawaiian government; that from the time of taking the school in 1849 until 1903 the Hawaiian government caused religious instruction to be given at the school as it formerly had been given, thereby showing its understanding that the agreement required this to be done. This understanding on the part of the government was further shown by a letter of October 29, 1864, of Attorney General C. C. Harris to the board of education advising that only those sects could control the school which taught the doctrines of each and all the articles of the confession of faith and if the government was not willing to keep the conditions the property and improvements must be restored to the American Board; that the following year the board of education declared that "a full compliance with the agreement consists in appointment of persons teaching in the doctrine and after the manner of the Con-

gregational and Presbyterian churches of the United States, and if the board do not see fit to carry on the institution they must reconvey it or pay the sum of \$15,000."

It is alleged that religious instruction at the school ceased in September, 1903, when the Territory made the school a technical school named the Lahainaluna Agricultural School. The cessation of religious instruction and of instruction in sound literature and solid science other than is implied in the teaching required at a technical and agricultural school is alleged to be a breach of the original agreement.

The plaintiffs contend that a practical construction has been placed upon the agreement by both parties, which is binding upon the defendant, conforming, as it does, to the objects for which the school was primarily established.

It is too late, they say, after both sides for over fifty years have acted upon the agreement as one which required that the government continue the previous course of religious instruction at the school, for the Territory now to restrict the meaning of the agreement to its precise language.

That the unwritten term above mentioned was by the parties themselves read into and made part of the agreement has been urged in the plaintiffs' argument and in their brief with great earnestness and evidently with profound conviction of its truth. In support of their contention they cite numerous decisions and extracts from text writers, including Lord Chancellor Sugden's remark, "Tell me what you have done under a deed and I will tell you what that deed means," which remark, it is said, "has come to be accepted as a maxim in the construction of contracts." *Chicago Ry. Co. v. N. P. Ry Co.*, 101 Fed. 792. This was a case in which the court held that a contract between two railways, requiring one of them to keep and maintain in good order property in their joint use, included the expense incurred for flagmen, station agents, switch tenders and other employees whose services were necessary to the safe and orderly operation of trains running over the joint tracks, and especially as the expense had for ten years been paid by the company on monthly

itemized statements, showing how both companies understood the contract and there being "no inconsistency between the terms of the contract and the practice of the parties under it." We have not access to the report of the case in which the Sugden remark is said to have been made, *Drummond v. Atty Gen.*, 3 Dr. & W. 165. It appears from the report of the case on appeal, 2 Ho. Lords Cas. 186, that the court was required to say whether the expression "protestant dissenters," used in a deed of trust, included unitarians who had for a long time been treated by the trustees as within the meaning of the trust deed. Much evidence was received consisting in great part of historical documents, extracts from sermons and theological and controversial works published by the trustees, ministers of Dublin congregations, both prior to and after the foundation of the charity. There was further evidence "that the founders and original trustees and their successors for a long time were not merely trinitarian protestant dissenters, but that they had in various ways manifested the utmost abhorrence of unitarians and their doctrine." Lord Chancellor Sugden decreed that unitarians were not entitled to participate in the trust funds and that those of them who were trustees should be removed and others, trinitarians, appointed in their places. The decree was affirmed on appeal, the court saying, "It is clear that the words of themselves have not any such known legal meaning as the appellants would attach to them." Neither of these cases would authorize the admission of evidence to explain the meaning of words having an established, clear and unambiguous meaning. It is only with reference to ambiguous, uncertain or incomplete terms in a contract that the citations in the plaintiffs' brief apply, namely, that "a construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract." 1 Wharton, Contracts, Sec. 206.

"In cases where the language used by the parties to the contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves

is entitled to great, if not controlling influence." *Topliff v. Topliff*, 122 U. S. 121.

"Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence." *Chicago v. Sheldon*, 9 Wall. 50.

"The great object and only foundation of all rules of construction is to come at the intention of the parties, and if the words or terms are equivocal, resort may always be had to the circumstances under which the contract was executed, contemporaneous constructions of the parties, as evidenced by their acts, and any subsequent acts showing how the parties understood their contract and what practical construction they put upon it." *White v. Amsden*, 67 Vt. 1.

"If the parties have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning, as the only effect of such evidence would be to contradict the legal effect of the language which the parties themselves have used." 2 Page, Contracts, Sec. 1111.

"If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight." *Ib.* Sec. 1126.

"Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof." *Ib.* Sec. 1130.

Thus it appears from many of the plaintiffs' citations that the rule of construction of contracts is not as broad as they claim.

The terms of agreement are not of doubtful import,—they are as clear as language can express. Why it was that no condition was made which required the government to give religious instruction, why the representatives of the board thought that this condition would be observed although not expressed, and why it appears to have been regarded by the government as an implied condition, becomes evident, we think, upon reflection. No man of New England birth and training was unfamiliar with the general custom prevailing in the public schools of giv-

ing at least the amount of religious instruction included in morning prayers and in scriptural readings; no one familiar with this custom as were most, if not all, of the missionaries in Hawaii, would for a moment have doubted that some sort of religious instruction would continue indefinitely to be taught at the Lahainaluna school as well as all other schools. In the thought of the American Board and of the Hawaiian Mission as well it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed. Those officers of the Hawaiian government, who, like attorney general Harris, were members of the Protestant Episcopal Church, were perfectly aware of the distinctive theological tenets of their own church and of other evangelical churches of America and knew that the teaching at Lahainaluna of their own church doctrines would be to repudiate the agreement with the American Board and would result in a forfeiture of the property transferred to the government by the board unless the sum of \$15,000 should be paid in accordance with the agreement; they did not, on their part, contemplate that which has come to pass, namely, that the school might receive no religious instruction upon any theological basis. One may regret that wise and devout Christian men in America, whose practical Christianity was sufficient to enable them in their several ways to accomplish so much for the uplifting of humanity, have found themselves unable to agree upon some form of religious instruction in the schools, but thus far this has not come about.

Whatever the reasons which influenced the Hawaiian government in treating the agreement as it did, its officers had no power to add to or subtract from its clearly expressed terms, nor did they by carefully avoiding the teaching of any doctrines, other than those mentioned in the agreement, thereby admit any obligation of the government to teach any doctrines.

As for the American Board, whether by oversight, or because they thought it unnecessary, or that it was unwise in view of the possibility of exciting antagonism in the legislature or in the cabinet of the King, they did not incorporate in the agreement

the requirement which the plaintiffs say was intended to be agreed upon. This court has no right to take the agreement as meaning anything else than it clearly expresses.

We have preferred, before stating and discussing the defendant's demurrer to the petition, to consider what the agreement was to which the demurrer applied. It follows from holding that there was no agreement for affirmative religious teaching but merely that no heterodox instruction should be allowed, that no breach of agreement resulted from ceasing to teach the prescribed doctrines. This amounts to sustaining the ground in the defendant's demurrer which claims that the petition sets forth upon that subject no cause of action. The grounds of the demurrer in substance are (1) that this court has no jurisdiction of the claim for damages; (2) that the United States, to whom the land has been ceded upon which the school is established, ought to be made codefendant; (3) that no cause of action is stated, it appearing (a) that the agreement was subject to ratification by the legislature and the act of July 11, 1850, relating to the Lahainaluna seminary failing to set forth the terms on which the arrangement was made but merely that one had been made "whereby the seminary of Lahainaluna has been ceded to the King's government on condition that the government undertakes its support," (b) that the right of action, if any, accrued upon the annexation in 1898, more than two years prior to the commencement of this action, (c) that no breach of any condition is shown, and (d) that if the conditions of the agreement were broken this was done in consequence of laws rendering the performance of them impossible; (4) that the petition pleads conclusions of law in its assignment of breach of conditions, not setting forth in what respect the conditions were broken.

The first, second and fourth grounds and divisions a, and b, of the third ground of the demurrer are not sustained.

The question of the impossibility of the performance of the agreement presented by the demurrer relates to the provision in section 55 of the Organic Act, "nor shall any public money be

appropriated for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the government," being in effect the same as the requirement of article 97 of the constitution of 1894, prohibiting public aid to sectarian or private schools. As we have held that there was no agreement to teach certain religious doctrines, the question does not arise of the effect of subsequent legislation and, in view of its importance, ought not to be passed upon obiter.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture. The averment in the petition of the fact that the "cultivation of sound literature and solid science has also ceased" would raise an issue of fact to be tried on evidence were it not modified, and necessarily controlled, by the additional averment that "the institution has become a technical school under the name of the Lahainaluna Agricultural School." By the rule that at common law pleadings are construed, as far as they reasonably may be, against the pleader, the additional averment must be taken to be an admission that the usual technical training is now given at the school in the science of agriculture, so that it becomes a question of law whether such training eliminates, as contended by the plaintiffs, or, on the other hand, includes instruction in sound literature and solid science. An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. We are not prepared to say that such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

The plaintiffs say that an agricultural school, although scientific in character, "is a school primarily intended to the training

of its students in the adaptation of certain selected branches of knowledge to a handicraft or industry; while incidentally the school probably does lead to the inculcation of some learning and knowledge, it would be knowledge or learning of a special character, the accomplishment of which in itself is not the purpose of the school. The purpose of the school is rather intended for the training of men for an occupation. This negatives the idea that it is an institution for the cultivation of solid science."

Cases are cited which discuss the meaning of literary and scientific institutions, technical schools and schools generally with reference to exemption of property from taxation, but this case does not demand strict construction of a statute which exempts property from taxation. In considering the meaning of the agreement we derive no assistance from definitions of "literature" and "science" or from considering the various purposes of acquiring knowledge for general use or for use in specific work.

The literature taught in American schools fifty years ago did not include the literary courses of the present day; little more was taught which hinted at literature than reading, grammar and composition, the object being to acquire a habit of using the English, and at Lahainaluna the Hawaiian, language correctly. A technical school may or may not, according to its grade, require these studies, but a correct and intelligent use of language is as likely to be acquired in connection with technical studies as when made a separate subject of study. Probably Lahainaluna pupils obtained more proficiency in the use of language by their practical work in printing, which for many years was extensively carried on there, than by theoretical studies.

In no way of looking at the subject which commends itself to our judgment do we regard the agreement as violated by making this a technical school of agriculture.

The demurrer is sustained.

D. L. Withington and C. H. Olson, Castle & Withington and Smith & Lewis on the brief, for plaintiffs.

M. F. Prosser, Deputy Attorney General, for the Territory.

TERRITORY OF HAWAII v. MORITA KAIZO.

QUESTIONS RESERVED BY CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED DECEMBER 23, 1905. DECIDED JANUARY 3, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CIRCUIT COURTS—*jurisdiction to naturalize.*

Under the naturalization laws of the United States and the Organic Act the circuit courts of this Territory have power to naturalize.

OPINION OF THE COURT BY WILDER, J.

(Hartwell, J., dissenting.)

Defendant was indicted for murder by a grand jury composed of sixteen members at the August, 1905, term of the circuit court of the fourth circuit. He filed a plea in abatement to the effect that eight of the members of the grand jury were aliens and therefore ineligible and incompetent to act. It appeared that some time between June 14, 1900, and August 1, 1905, each of said eight grand jurors being entitled to be naturalized applied for a judgment of naturalization to the circuit court of the fourth circuit, and upon such applications being considered the court pronounced upon each of the applicants a judgment of naturalization.

The following reserved questions were certified to this court:

1. Had the circuit court of the fourth circuit of the Territory of Hawaii between June 14, 1900, and August 1, 1905, jurisdiction to pronounce judgments of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement?

2. Was the grand jury empaneled and sworn for the August, 1905, term of the circuit court of the fourth circuit comprising sixteen members, eight of whom were naturalized as aforesaid, a legal body under the laws of this Territory and competent to find a legal indictment against the defendant?

3. Shall the defendant be held to answer the indictment thus found by said grand jury?

The main question for decision is whether under the naturalization laws of the United States and the Organic Act of this Territory the circuit courts of this Territory have power to naturalize.

Section 2165 of the revised statutes of the United States provides that aliens may be naturalized by a circuit or district court of the United States, a district or supreme court of a territory, or a court of record of any state having common law jurisdiction and a seal and clerk.

Section 81 of the Organic Act of this Territory provides as follows: "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

Section 86 of the same act provides, among other things, as follows: "That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. * * * Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court. * * * The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern

in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.”

Prior to its annexation to the United States the Republic of Hawaii had a fully organized government, including a judicial system, consisting of courts of original and appellate jurisdiction, whose powers were defined by the constitution and statutes of the republic.

The relations between the federal courts and the courts of this Territory are similar to those between federal courts and state courts. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308; *Ex parte Wilder's S. S. Co.*, 183 U. S. 545; *Hind v. Wilder's S. S. Co.*, 13 Haw. 174. As was said in the last case cited congress “organized the courts and distributed their jurisdiction in this Territory as it has done in no other territory—namely, on the lines of federal and state courts in the several states.” Page 182. On page 183 the reason for this was suggested as follows: “The fact that this Territory is so far removed from the mainland is ample to explain why congress intended to make the judgments of our supreme court final except in cases in which a federal question was involved, and to permit such cases to be taken up only as they would be taken up from a state court, that is, by a writ of error from the supreme court of the United States.” That reason was approved in *Equitable Life Assurance Society v. Brown*, *supra*, at page 551, as follows: “Congress may have considered that, owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that territory should extend only, as in the case of the several states, to judgments against a right claimed under the constitution, laws or treaties of the United States.” But whatever the reasons were, the effect was as stated.

Congress not having established within this Territory the ordinary territorial courts, and having provided a system similar to that in the several states, it follows that the jurisdiction to naturalize in this Territory should be and is the same as in a state, namely, by a court of record having common law juris-

diction and a seal and clerk. Each of our circuit courts is a court of record having common law jurisdiction and a seal and clerk. That this was the intention of congress we have no doubt, when it is considered that congress established in this Territory a district court of the United States, the same as is established in every state of the union, and which has, of course, power to naturalize.

The privilege of becoming an American citizen is a great one, but the number of courts with jurisdiction to naturalize should not be limited unless congress expressly or by necessary intentment so provides. The tendency of congressional legislation on the subject has been to enlarge rather than to diminish the number of courts which could naturalize. See *Ex parte Cregg*, 2 Curt. 98. The very reason for investing congress with power to establish a uniform rule of naturalization was to guard against a too narrow instead of a too liberal mode of conferring citizenship. *Collet v. Collet*, 2 Dall. 294. The statute intends naturalization certificates to issue from courts of record. *Spratt v. Spratt*, 4 Pet. 393, 408. See also *Mutual Benefit Life Insurance Company v. Tisdale*, 91 U. S. 245. All courts look with favor on proceedings to admit aliens to citizenship. *McCarthy v. Marsh*, 5 N. Y. 284. See also *Ex parte Butterworth*, 1 Woodb. & M. 223.

There is also considerable force in the argument that the courts in this Territory having practically the same jurisdiction as the ordinary territorial district courts, namely, the district court of the United States and the circuit courts of the Territory, have the power to naturalize. In *Ex parte Lathrop*, 118 U. S. 113, the legislature of the Territory of Arizona created and established a county court with concurrent jurisdiction with the district courts, the provision in the organic law of Arizona being that the "judicial power of Arizona shall be vested in a supreme court and such inferior courts as the legislative council may by law prescribe." The power of naturalization was expressly given to this county court. It was held this court

was an inferior court and that its jurisdiction could be made concurrent with that of every other court inferior to the supreme court. No comment was made upon this express power of naturalization. But, in view of the conclusion reached that any court of record in this Territory having common law jurisdiction and a seal and clerk has power to naturalize, it is unnecessary to say whether our circuit courts are territorial district courts within the meaning of the naturalization statute.

Defendant further contends that, even if the circuit court had jurisdiction to naturalize, still the grand jury was improperly constituted, because it does not appear that the eight members of the grand jury in question were naturalized before they were drawn to serve and that they might have been naturalized after having been selected. But the burden is on the defendant to show that they were aliens at the time they were drawn, and, as he has not done that, the presumption is that they were citizens at that time.

Each of the three reserved questions is answered in the affirmative.

M. F. Prosser, Deputy Attorney General, for the Territory.
Carl S. Smith for defendant.

CONCURRING OPINION OF FREAR, C.J.

The statute (Rev. Sts., Sec. 2165) permits naturalization by "a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction, and a seal and clerk." Thus the jurisdiction is conferred on federal, state and territorial courts. If the circuit courts of this Territory have it, it must be because they are "district courts" of a territory within the meaning of the statute. The question then is whether the word "district" in the statute is a word of description or a proper name. If it is the latter and refers only to such courts of that name as have been created by congress in other

territories the statute does not apply to our circuit courts. If it is descriptive there is no reason why it should not apply.

There is little in a name. Our district courts corresponding most nearly to justices' courts elsewhere do not have jurisdiction to naturalize although they are "district courts" of a territory, nor could our territorial legislature confer such jurisdiction upon even a court of record of general jurisdiction by merely calling it a district court. Even the United States district court of Hawaii does not have this jurisdiction because it is called a district court, though by Act of Congress, because on the one hand it is not a district court of the United States in the sense of a constitutional court, for it is a legislative court just as our circuit courts are, nor on the other hand is it a district court of a territory, for not only does it not have the jurisdiction of such a court in general, but it is a court for the entire Territory. It has such jurisdiction because it has been expressly given the jurisdiction of a circuit and district court of the United States.

It is true that our circuit courts differ from the district courts of other territories in various respects. For instance, they are presided over by their own circuit judges and not by judges of the supreme court assigned to the circuits or districts. They also do not have the combined federal and territorial jurisdiction, but are more like state courts in having the local jurisdiction only. But they are courts of record of general, original, common law jurisdiction, and there is no reason why congress, in distributing the two classes of federal and territorial jurisdiction between two sets of courts in Hawaii, instead of combining them in the same courts as elsewhere, should not have intended that each set should have jurisdiction to naturalize. There can be no doubt that the supreme court of this Territory has such jurisdiction, although that, equally with the circuit courts, has only territorial and not federal jurisdiction. The name "circuit courts" was retained by congress because that name was already in use here.

That the word "district" should be construed in a descriptive sense with reference to territories, is supported by the fact that congress itself so construed the same word with reference to the states when, after conferring jurisdiction to naturalize upon the "supreme, superior, district or circuit court of some one of the states" by the act of 1795, it provided as follows in the act of 1802 (2 St. at L., p. 155): "And whereas, doubts have arisen whether circuit courts of record in some of the states, are included within the description of district or circuit courts: Be it further enacted, that every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act."

Not only is there no objection to the exercise of such jurisdiction by such circuit courts, for similar courts throughout the states and territories exercise it, but it is particularly desirable that they should have it because in four of the five circuits of the Territory the supreme court cannot sit and in three the United States district court does not sit and in one of the other two the latter court sits only once a year, although it is permitted by the statute to sit at other times and places; and such time and expense would be required for the attendance of applicants where such courts usually sit as would in many instances be prohibitive. Such jurisdiction has been exercised by the circuit courts ever since the establishment of territorial government and probably the majority, about a thousand, of naturalizations, have taken place in those courts. I believe the exercise of such jurisdiction by the circuit courts was begun on the suggestion of United States District Judge Estee, and more recently an application to his successor, Judge Dole, for naturalization by one whose naturalization by a circuit court had been questioned, was denied.

On the whole, although with much doubt, I am of the opinion that the circuit courts have such jurisdiction.

DISSENTING OPINION OF HARTWELL, J.

Congress alone can authorize a court to naturalize aliens. The only authority by which aliens can be naturalized in Hawaii is that which is granted to the federal court and to "a district or supreme court of a territory" by Sec. 2165, U. S. Rev. Stat. Unlike our circuit courts territorial district courts in other territories than Hawaii are held by one of the justices of the territorial supreme court and, by act of congress, have jurisdiction "of all matters and causes except those in which the United States is a party," including therein admiralty and bankruptcy matters.

It would be convenient to residents upon other islands than Oahu who desire to become naturalized to be able to go before the circuit courts upon those islands for that purpose although the federal court has authority to hold terms in any circuit whenever applications are pending there in sufficient number to justify the holding of a term. Probably congress will amend the Organic Act to give our circuit courts the power to naturalize, which at present they do not have unless we regard them as included in the term "district courts of a territory." This cannot be done without changing the clearly expressed language of an act of congress, doing this upon the theory that the act means something different from what it says. Every departure from the clear language of a statute is in effect an assumption of legislative powers by the court. *Brewer v. Blougher*, 14 Pet. 178. Whenever harm or absurdity results from taking a statute to mean just what it says all reasonable effort ought to be made to evade the literal meaning on the ground that congress is not presumed to have intended such results, but here no such results will occur from restricting naturalization to this court and the federal court; the only loss would be in costs which have been paid by those who have become naturalized in circuit courts and in cases of renaturalization such costs ought to be remitted. Undoubtedly it was an oversight that the Organic Act did not at first give this power to our circuit courts, but

we have no authority to supply the omission. "A case which has been omitted is not to be supplied merely because there seems to be no good reason why it should have been omitted, and the omission appears consequently to have been unintentional." Endlich, Int. St. Sec. 18. For this court to declare that circuit courts have jurisdiction for the purpose of naturalizing aliens would be practically the same as enacting a law to that effect, doing this upon the theory that congress intended that our circuit courts should have like powers with state courts of record in respect of this matter of naturalization; or else upon the theory that congress really meant that our circuit courts should take the place of the district courts in the other territories. There is no reason why this court should indulge in any presumptions concerning a statute which is so clearly expressed as to leave no occasion for its interpretation or construction.

As I regard the statute as too clear to admit construction of its meaning and as its express language does not authorize naturalization by our circuit courts, I am unable to concur in the opposite conclusion of the court.

FRANK LUCWEIKO v. TERRITORY OF HAWAII AND
THE HONOLULU RAPID TRANSIT AND LAND
COMPANY.

ORIGINAL.

SUBMITTED JANUARY 6, 1906. DECIDED JANUARY 15, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

BOA FIDE PURCHASER FOR VALUE—*no relief against inequity.*

The Territory acquired of the plaintiff certain land for street extension and for the use of the H. R. T. & L. Co. tracks and cars as required by statute, with an agreement to move plaintiff's build-

ings in good order to another portion of his land and make the highway in front thereof and of other land obtained from the trustees of the B. Estate for him passable for vehicles, which agreement was inserted as a covenant in a conveyance executed by the governor, but which, it had been held, he was not authorized by statute to make. Held: the Transit Co. is a bona fide purchaser for value without notice of nonperformance of agreement by the Territory so that the relief prayed for cannot be granted. Demurrer to the bill on this ground is sustained, but without deciding that upon the facts alleged the plaintiff is without remedy, if pursued within the time limited by statute, for nonperformance of an agreement made by authority of law by the superintendent of public works.

OPINION OF THE COURT BY HARTWELL, J.

This is a suit in equity upon the following statement of facts:

The plaintiff owned certain land fronting on Beretania street in Honolulu at the eastern junction of that street and the proposed eastern extension of King street. It was necessary for the Territory, in order to complete the extension of King street to its eastern terminus and make a junction with Beretania street and to carry out its obligation to the Honolulu Rapid Transit & Land Company to secure to that company the right to construct and operate a railway over the then unopened extension of King street to the road from Beretania street to Moiliili, to acquire, by condemnation proceedings or otherwise, the plaintiff's land and to make a public highway over the same. In pursuance of these plans of the Territory and the necessities existing and the duties imposed upon it by its statutes and laws upon the subject, the Territory, by and through its officers, Hon. Sanford B. Dole, governor, Hon. Henry E. Cooper, superintendent of public works, and Hon. Lorrin Andrews, attorney general, negotiated with the plaintiff that he should convey to the Territory the land required for said purposes in consideration that within sixty days thereafter the Territory should cause all the buildings and fences upon the premises, conveyed by the plaintiff to the Territory, to be removed from the land and placed

upon the remaining portion of his land and upon certain land to be conveyed to him by the trustees of the Bishop estate in as good order and condition as the same were then in.

That in pursuance of the said agreement, on June 15, 1903, the plaintiff executed and delivered to the defendant his deed in fee of the said premises; that the Territory, acting by and through its said officers, accepted delivery thereof and pretended to carry out the considerations of the agreement, and did cause the trustees of the Bishop estate to convey to the plaintiff a piece of land composed of and covered with coral rock for which, as the plaintiff is informed and believes, the Territory paid the Bishop estate \$103; and further did, by the superintendent of public works, cause the buildings, fences and improvements to be set back from their frontage on Beretania street to the new line of King street extension, but that they were not moved in a skillful nor workmanlike manner within sixty days but long after that time; nor were they placed in their new position in as good order and condition as at the date of the conveyance, but were greatly injured to an extent which required the expenditure by the plaintiff of a large sum of money for repairs; that the buildings were so shaken and injured during the removal that unless practically rebuilt they could not be put in as good order as they were in before; that during the negotiations the said officers of the Territory stated to the plaintiff, and he understood, that the proposed extension of King street should be put in good condition as a street and that the plaintiff's buildings and premises should have a frontage upon a street or road as passable for vehicles as their previous frontage had, with the same good access and egress to and from the premises as the same formerly had, but that since the extension of King street has been opened and the plaintiff's property converted to the use of the Territory and of the defendant corporation the only improvement made has been in laying down the railroad tracks and that the remainder of the road has not been made passable for vehicles, so that the plaintiff's buildings, as placed by the officers of the Territory, are practically unapproachable by

vehicles, the result of all of which being to prevent the plaintiff from obtaining tenants for his buildings and to cause the same to remain unrented and a great source of loss and expense to him, including taxes thereon which he has to pay to the Territory, as a result whereof plaintiff's lands and tenements are reduced in value to the extent of about \$5000.

That the plaintiff, in order to prevent the total destruction of his property, has been compelled to expend large sums of money in labor, repairs, wells, removing windmills, lumber, and other expenses amounting to about \$2000, including rental losses.

That the plaintiff presented his claim for the losses sustained by him within two years after they were due and brought an action of covenant against the Territory in this court, which decided that the covenant, which was the sole and moving consideration upon which the plaintiff conveyed his land, could not be enforced because the conveyance to the plaintiff was signed by the governor and that he had no authority to bind the Territory by the covenant.

That at the time of the conveyance the plaintiff, and also the governor, believed that the governor was the proper officer to make the agreement and pledge its fulfilment by the Territory, but that by mistake and inadvertence on the part of the plaintiff and the governor the plaintiff is unable to enforce his claims against the Territory at law and can have relief solely in equity; that inasmuch as the agreement had been made by the proper officer, namely, the superintendent of public works, he ought to have executed the deed in behalf of the Territory, but that the Territory, although accepting the title in the land from the plaintiff and pretending partially to perform its agreement, has done the plaintiff great loss and damage and by repudiating in this court the agreement of its officers has received great benefit and value from the plaintiff and in equity has failed to furnish the good consideration for and by virtue of the expectation of which the plaintiff parted in good faith with his land and that the Territory should not in equity and good conscience be permitted to claim and assert title therein,

but that this court should place plaintiff in as good position as he had before he conveyed his land to the defendant.

That about July, 1903, the defendant corporation tore up the said property of the plaintiff and constructed thereon a track for the passage of its cars which for over two years have been running over the same, but that the company has no legal or equitable right so to use and occupy the plaintiff's land and by using it has caused the plaintiff damage in the sum of \$1000.

That the defendant corporation claims a right of way over the plaintiff's premises under the statutes of the Territory and by the express rights and privileges given to it by the Territory, wherefore the plaintiff prays that his deed to the Territory be cancelled and that the Territory be ordered to deliver to him a deed in fee simple for the premises and be enjoined from using the same as a public street or highway; that the defendant corporation be restrained from using the premises or running its cars over the same and that the court decree that the Territory pay the plaintiff all losses and damages caused to it by the defendants' unlawful and inequitable acts, to wit, \$5000, and that the defendant corporation be decreed to pay the plaintiff the said sum of \$1000 for its unlawful use of his premises.

The Territory demurred on the grounds that the court has no jurisdiction, misjoinder of defendants and that the plaintiff does not state a cause of action in that it is not shown that the cause of action therein set forth is based upon any contract or act of a territorial officer authorized by law to make or do the same. The Rapid Transit Company demurred on the same grounds, with the additional ground that there is misjoinder of causes of action.

The position of the defendant corporation with reference to that portion of the plaintiff's land conveyed by him to the Territory which the company is using for its railroad track and cars must be deemed to be that of a bona fide purchaser for value without notice of nonperformance by the Territory of any part of its agreement concerning the conveyance. It is not in the power of the Territory to cancel the rights granted to that com-

pany, hence it follows that the relief prayed for by the bill cannot be granted. We do not mean to say that upon the facts alleged in the bill the plaintiff is without remedy, if pursued within the time limited by the statute, for the nonperformance of an agreement made under the authority of law by the superintendent of public works.

The demurrer is sustained.

Charles Creighton for plaintiff.

M. F. Prosser, Deputy Attorney General, for the Territory.
Castle & Withington for defendant corporation.

IN THE MATTER OF THE ESTATE OF KEAHO (w.),
DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 8, 1906.

DECIDED JANUARY 17, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

WILL—*revocation of probate.*

A decree dismissing a petition to revoke the probate of a will on the ground of forgery is affirmed on the evidence.

Id.—*practice.*

The rule announced in *Territory v. McCandless*, 16 Haw. 728, and *Texeira v. American Dry Goods Association*, ante 41, that it is not correct practice in equity to dismiss a bill at the close of plaintiff's case on motion of defendant without resting is applicable to a proceeding of this kind.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a decree dismissing a petition to revoke the probate of a will on the ground that the will was a

forgery, this proceeding being brought about three years after probate. The petitioners are four of the five children of testatrix, the revocation being contested by the husband and sole devisee under the will and the fifth child.

Appellants contend in the first place that, on the authority of *Territory v. McCandless*, 16 Haw. 728, and *Texeira v. The American Dry Goods Association*, ante 41, the decree should be reversed because the respondents without resting moved to dismiss the petition at the close of petitioners' case, which motion was granted. The rule announced in those two cases applies to proceedings of this kind as well as to equity suits proper. The reason for the rule is the inconvenience of deciding a case piece-meal, that is, a judge or court should not be required to pass upon the merits of a cause more than once. See *Fuller v. Met. Ins. Co.*, 31 Fed. 696. If a defendant without resting desires to move that plaintiff's bill be dismissed on the ground that the evidence fails to sustain the allegations, he should be required to waive his right to put on evidence, because, if he is not willing to rest, then he must admit that plaintiff's evidence calls for a defense. This, of course, has nothing to do with the right of a judge at any time to dismiss a bill of his own motion. But, in the case at bar, although respondents were not required to rest before having their motion to dismiss the bill entertained, in effect it was the same as if evidence was introduced for respondents, because petitioners themselves introduced testimony for the defense by putting in all the evidence taken when the will was probated.

The claim of the petitioners that the will was a forgery is based upon the fact that the testatrix could not write, the will showing that her name was written, and upon the evidence tending to show that the testatrix could not have executed the will because she was unconscious at the time the will was alleged to have been signed, and that the will was antedated one day.

The will devised all the property to the husband of the testatrix to the exclusion of all the children, who were all of age.

This was under the circumstances a perfectly natural disposition to make of the property.

Petitioners put in all the evidence taken at the time the will was probated. They now claim that it was offered merely to show on what testimony the will was probated. But, whatever the purpose was of offering such testimony, the effect was that a prima facie case was made out in favor of the will, which the petitioners had to meet and overcome. See *Hesterberg v. Clark*, 166 Ill. 241.

That the testatrix could not write was expressly admitted by respondents. The will was signed with the name of the testatrix written out in full, there being nothing to indicate that she was assisted in signing or that it was signed for her by some one else. The witnesses to the execution of the will testified that the testatrix signed it in their presence and in the presence of each other and of the husband of testatrix, one witness testifying that the testatrix "wrote her name on this document, subscribed it herself." This is not absolutely inconsistent with the fact that the testatrix may have been assisted to write her name and is not sufficient to justify a finding that the will was forged.

One of the petitioners, Maleka Mokuahi, testified that she was with her mother for a week preceding her death and up to 3 p. m. on the day she died; that on the day of her death, up to that time at any rate, the mother was practically unconscious, being unable to hear, see or talk; that on the morning of the day of her mother's death the husband spoke of having a will made, but the witness said that it was too late as her mother was then out of her senses. C. S. Mokuahi, the husband of the last witness, testified that on the morning of the death of the testatrix he tried to talk to her, but she could not recognize or hear him, although he admitted on cross-examination that she may have been asleep at the time. Kauwila, a sister of testatrix, and the wife of the man Barenaba who drew the will, testified that the testatrix was unconscious at about 6 p. m. on the day of her death, the will having been executed an hour or so before

that time. The strongest witness for the petitioners was one Frank Joseph, a son in law of testatrix. He testified that a few hours before her death a paper was read to testatrix, but she was unconscious and could not move or speak, and that although he was not in the room yet he was in an adjoining room and in a position to see and hear everything that went on. Everything was carried on in Hawaiian, the witness understanding only a little. He saw one witness sign the paper, but did not see the testatrix or the other witness sign.

That the will was dated August 12th, and the evidence tended to show that it was executed August 13th, we regard as having very little weight.

In the face of the positive testimony given at the probate of the will we cannot say that the trial judge erred in holding that the petitioners did not overcome the prima facie case thus made out in favor of the will. The same judge heard both the petition for probate and the petition to revoke the probate, and this is an important factor, because he was in a better position than any one else to judge of the truth or falsity of the testimony given by the various witnesses. Although the record does not specifically state the reasons of the judge for dismissing the petition, yet it is apparent that he could not have believed all of the testimony given for the petitioners. We cannot hold that the trial judge erred in his conclusion, although it is not necessary to go as far as the case of *Estate of Kealiiahonui*, 6 Haw. 1, which held that the same amount of proof should be demanded in support of a petition to revoke the probate of a will as would be required to convict the parties implicated upon a criminal prosecution for forgery.

Petitioners also claim that there was error in refusing to allow Kauwila, the wife of Barenaba, who died a year or so after the death of Keaho, the testatrix, to be questioned concerning statements made by him to her as to the matters in dispute. The evidence sought to be elicited was clearly hearsay and was rightly rejected for this reason, if for no other. The claim of petitioners' counsel that these statements should have

been admitted on the ground that they were against interest, and consequently an exception to the hearsay rule, is without merit, because Barenaba was not a party in interest either in this proceeding or in the one to probate the will.

The decree appealed from is affirmed.

S. H. Derby (*Kinney, McClanahan & Cooper* on the brief) for petitioners.

C. F. Peterson for respondents.

KAPIOLANI ESTATE, LIMITED, *v.* LORRIN A.
THURSTON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 10, 1906.

DECIDED JANUARY 22, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ESTOPPEL IN PAIS—*estoppel of landlord by judgment against tenant.*

Plaintiff's title was under a conveyance of June 20, 1874, from K. to the king, of lands at Waimanalo and at different places in Honolulu under four Royal Patents less a portion in one of them sold to O. with whom K. was then living as his wife. After the king's death O., claiming as husband and heir of K., brought ejectment against C. and obtained a verdict and judgment for two apanas of the Waimanalo land leased to C. by the king's trustees. His niece and heir, L., wished W. R. C. to take charge of her lands. Before taking her deed of trust he called upon Kapiolani to ascertain whether she claimed the rest of the lands conveyed by K. and, after talking with her "of the Cummins' suit and the Waimanalo piece," asked, "Do you make any claim to any of these lands," and she said, "I have no claim whatsoever, make no claim on the lands." He said he explained to her that L. wanted him to act as her trustee and he "did not like to go into it if there was a lawsuit involved"; that he, relying on her statement, took the deed of trust, and afterwards, for \$2000, conveyed this land

to the defendant with covenants of warranty. It was his impression that he talked with the queen dowager specifically about the different lands in the K. deed, but he could not say that he did so or recollected "any particular conversation about either one." After some talk, "she expressed some uncertainty of what I was talking about, then I told her that it was Okuu's lands, that Lei-aloha got these lands from Okuu, then she at once brightened up, looked intelligent about the matter. We talked quite awhile about these Okuu lands. * * * She understood at that time the whole thing, and that she had no interest in those lands and she so stated." Held: This was not the case of a prospective buyer, induced by the queen's statement to expend money to purchase the land or for improvements. As trustee he was not obliged to expend his own money or incur obligations in defending suits for the land. He did not inform the queen, and she could not have supposed, that he thought of conveying the lands with covenants of warranty which a trustee is never required to give. If her statement was a promise or expression of intention not to claim this land, it was not an estoppel. The evidence is too uncertain to justify the inference that she knew that W. R. C. was talking to her of any other lands than those which O. owned or had obtained by his judgment, and was not such as reasonably justified a prudent man, in reliance thereon, to convey the land with covenants of warranty.

The judgment against the tenant is not conclusive in this case upon the owner, nor does it make O.'s marriage, decided in that case, *res judicata* in this case. If one wishes a judgment to bind the landlord he must make him a party. This is true in this case although the administrator of the king's estate, if acting under a power of attorney from the queen and not, as administrator, retained counsel to defend the case.

Id.—evidence—admissibility of judge's notes and charge—reputation at the king's court concerning illicit relations of a retainer—expulsion from church for such relations—errors in rulings on evidence, when insufficient to require setting aside verdict.

The judge's notes and charge at the trial of O.'s case are not evidence of the testimony of O. and other witnesses since deceased, nor as showing declarations of pedigree. To meet defendant's evidence that O. and K. were reputed to be living in wedlock the plaintiff could show their reputation of living illicitly. Reputation at the court, where O. was one of the retainers, was admissible. The fact that K.'s church expelled her from membership for her unlaw-

ful mode of living was not evidence and ought not to have been admitted, but in view of the other evidence upon that subject the error does not require the verdict to be set aside.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff having obtained a verdict in its action of ejectment on a new trial granted upon the defendant's exceptions (16 Haw. 447), the defendant brings here a bill of exceptions, the most important of which relates to certain evidence upon which the defendant claims an estoppel in pais. The title originated with Kahoopuipui (w) who, by deed of June 20, 1874, conveyed the land sued for, together with other lands, one of them situated at Waimanalo, R. P. 556, and the others in Honolulu, being land at Paliku, R. P. 4510, land at Kawaiahae, R. P. 2691, land at Kawanānākoa, R. P. 1968, less a portion sold to Okuu by deed of October 12, 1854, and two parcels at Kukulūāeo, R. P. 1990, to the king, David Kalakaua, by whom it was devised to Queen Kapiolani, and from her descended to the plaintiff's grantors. The defendant claims the land through Okuu as husband and heir of Kahoopuipui by descent from him to his niece, Leialoha Ai, who conveyed it in trust to W. R. Castle, the defendant's grantor. The plaintiff's title is not good if, as claimed by the defendant, Okuu was the husband of Kahoopuipui, since he did not give his written consent to her conveyance to the king; and if, as claimed by the plaintiff, he was not her husband, then the plaintiff's right to the land depends upon whether Kapiolani, by her statements to W. R. Castle prior to his taking the deed of trust, estopped herself and those holding under her from claiming this land. Thus the defendant, in order to recover, must affirmatively show either a valid marriage or else an estoppel, there being no question that the plaintiff's evidence, taken by itself, establishes its title.

January 4, 1899, the king's trustees leased to Cummins for fifteen years at an annual rental of \$10, apanas 1 and 2 of R. P. No. 556 of the Waimanalo land. March 15, 1892, after

Kalakaua's death, Okuu, as husband and heir of Kahoopuipuu, brought ejectment for this land and obtained a verdict April 20, 1892, upon which a judgment was entered April 19, 1901. Okuu afterwards died leaving as his heir his niece, Leialoha Ai, who wished W. R. Castle to take charge of her lands and for that purpose to convey them to him as her trustee. Before execution of the deed of trust, Castle, having heard that Kapiolani made no claim to "the land," went to see her and, after speaking of the matter, talked with her "about Leialoha and Okuu and these lands," and of the Cummins' suit, about the Waimanalo piece, "then I said to her, do you make any claim to any of these lands, and she said, I have no claim whatsoever, make no claim on the lands." He further testified, "I explained to her why I came there, that Leialoha wanted me to act as her trustee (kahu) and that I did not like to go into it if there was a law suit involved," the conversation being in Hawaiian. He further testified that he relied on her statement, took the deed of trust and afterwards, for the consideration of \$2000, sold the land now sued for to the defendant Thurston, giving a deed with covenants of warranty. On cross-examination he said, "I have an impression that we talked specifically about the Kawanakoa lands and the lands down here at Kawaiahao and the Waimanalo lands," but he could not say that they did; also, "I don't believe that I can recollect of any particular conversation about either one of the pieces." After he told her, "I wanted to know what interests she had in these lands of Leialoha's then, as I recollect, she expressed *some uncertainty of what I was talking about*, then I told her it was Okuu's lands, that Leialoha got these lands from Okuu, then she at once brightened up, looked intelligent about the matter, we got into a conversation about it, we talked quite awhile about these Okuu lands. * * * My impression is that I spoke about the Waimanalo lands, she assented at once and intimated that she understood that—she understood at that time the whole thing and that she had no further interest in those lands, and so stated." Upon the fore-

going statement the defendant claims that the plaintiff succeeding to Kapiolani's estate is estopped from bringing this action against himself as Castle's grantee.

In asking the queen whether she made any claim to any of these lands, Castle was not a prospective buyer, who, knowing that the legal title was in another than the proposed vendor, was seeking to learn, before purchasing, whether the owner would disclaim title or agree not to assert it. He was not contemplating purchase, but considering whether to take charge of Leialoha's lands. The fact that he desired to avoid annoyance from law suits was enough to prompt his inquiry, but Kapiolani's statement did not induce him to expend money to purchase the land or for improvements upon it. As Leialoha's trustee he was not obliged to expend his own money or incur personal obligations in defending suits for the land. Castle did not inform the queen and she could not have supposed that he thought of conveying the land with covenants of warranty, which a trustee is never required to give. Whether her statement was a mere promise, without consideration, or a statement of intention which she had a right to change, there would be no estoppel.

The rule was stated in *Re Bankruptcy of Thomas Spencer*, 6 Haw. 137 (1875). The bankrupt's agents had arranged with one of his creditors to defer placing him in bankruptcy and not molest the debtor. It was claimed that this estopped the creditor from bringing bankruptcy proceedings. Judd, J., held that there was no estoppel, no misrepresentation of facts, but merely a declaration of intention, which did not estop the creditor. "The intention of a party concerning his future action is necessarily uncertain. A person cannot be bound by any rule of morality or good faith not to change his present intention. The doctrine of estoppel wholly fails when the representation relates only to a present intention or purpose, because being in its nature uncertain and liable to change it could not properly form a basis or inducement upon which a party could reason-

ably adopt any fixed or permanent course of action." So Selborne, L. C., in *Madison v. Alderson*, 8 L. R. App. Cas., 473, says: "The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts." "Estoppel by representations applies only where the representation is as to a fact in existence at the time, not where it is as to something yet to come or as to a matter of future intention." *Bank of La. v. Bank of New Orleans*, 6 L. R., H. L. 352, as cited in 3 Ch. Eq. Dig. 2146.

"If a party make a representation concerning something in the future it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract with the peculiar consequences of a contract." Bigelow, Estoppel, 486.

Nor is it enough to create an estoppel that one relies on another's statement, it must reasonably justify the reliance to the average intelligence. "The representation or conduct must have been such as would naturally lead to the action taken. That is, it should be such as would justify a prudent man in acting upon it." *Ib.*, 491.

We do not think that it would have been the part of a prudent man, in his capacity as trustee, to convey this land with covenants of warranty in sole reliance upon the queen's remark above quoted.

"Whether an estoppel results from established facts is a matter for the determination of the court." *Hayselden v. Wahineaea*, 10 Haw. 17. "The court, and not the jury, determines the question of equitable estoppel if there are no facts in controversy; no uncertainty as to the inferences to be drawn from them." *Peabody v. Damon*, 16 *Ib.* 447. But "the intention to influence another and the influence must be made clear. Estoppel does not arise from acts or words of which the meaning and significance are doubtful." *Kauhi v. Liaikulani*, 3 *Ib.* 356.

The statement relied upon as estoppel "must be plain, not doubtful or a matter of mere inference. Certainty is essential to all estoppels. The courts will not easily suffer a man to be

deprived of his property or security where he had no intention to part with it." Bigelow, Estoppel, 490.

When, as in this instance, the estoppel claimed is based on recital of language used by a former owner of the estate many years deceased, the importance of this view is emphasized.

The evidence is too uncertain, we think, to justify the inference that the queen knew that Castle was talking to her about any other lands than those which Okuu formerly owned, or which he had obtained by the judgment against Cummins. Although Castle says she knew perfectly well what her property rights were, this appears to us to have been a conjecture on his part based on nothing sufficiently definite to be regarded as evidence as he says it was not until he "told her it was Okuu's lands that she looked intelligent about the matter."

In order to sustain the defendant's position, it would be necessary to disregard the rules of law announced in several well contested and considered cases in this court. Thus "in order to an estoppel by conduct there must have been a misrepresentation or concealment of material facts known by the party to exist and with the intention of inducing a party ignorant of the facts to act upon the representations." *Kamohai v. Kahele*, 3 Haw. 530. "In order to estop a party by his conduct, admissions or declarations the following are essential requisites: that the party making his admission by his declaration or conduct was apprised of the true state of his own title; that the other party *was not only destitute of all knowledge of the true state of the title but of all means of acquiring such knowledge.*" *Kela v. Pahuilima*, 5 Ib. 525.

In *Macfarlane v. Allen*, 10 Ib. 495, relied upon by the defendant, it was claimed that there was no estoppel because Mrs. Bishop improved the land knowing that it was Queen Emma's and relying upon the promise of Lunalilo to Kamehameha that he might have the land to build a retaining wall to the sea, and because Queen Emma, knowing of these acts, acquiesced in them. The court held that there was "no evidence to show

that Mrs. Bishop knew of the parole gift of Lunalilo, and, if so, she could not have relied upon it in making the improvements. Where a person takes possession of land of another knowing the true title he is a trespasser, and if he proceed to improve the land though the real owner seeing it says nothing, no specific opportunity occurring when he should speak, he is not estopped from thereafter claiming his land."

In *Goo Kim v. Holt*, Ib. 653, also relied upon by the defendant, the plaintiff, desiring to buy land inherited by two brothers, George and Peter, asked Peter if he did not have an interest in the land and Peter referred him to his brother George who, he said, had authority over it; that if Goo Kim bought he, Peter, had no right in it and would never claim any right to it. Goo Kim bought from George, and Peter, after receiving some of the purchase money, conveyed his half of the land to the defendant Holt. In an action by Holt for this land the court told the jury to find for him if Goo Kim knew that Peter was entitled to half of the property although he concealed or misrepresented the facts. This instruction was held to be wrong, this court holding that Peter, by telling Goo Kim that his brother could convey the property and that he himself had no authority to do so and no objection to George selling, acquiesced in the sale and waived his right to the land, since his declarations would naturally lead Goo Kim to suppose that he had released his claims. Neither of these cases sustains the defendant's contention.

The defendant further claimed that Okuu's judgment was conclusive against Kapiolani and that his marriage, established in that case, became *res judicata* in this case as well. In *Castle v. Kapiolani Estate*, ante, p. 61, we sustained the plaintiff's contention that the landlord was not estopped by a judgment in an action against his tenants because of his knowledge of and opportunity to defend it, and making no defense, saying: "If a plaintiff wishes to secure a judgment to bind the landlord, he must make him a party, since in no other way can he compel him to appear or become defaulted."

In ruling upon former exceptions, 16 Haw. 475, we held that evidence that the administrator with the will annexed of Kala-kaua retained counsel to defend the Okuu case was properly excluded because there was no privity between the executor and the devisee, stating as one reason "that the executor neither represents the land nor the devisee unless (as does not appear in this case), the will imposes upon him some charge or duty concerning the land. The evidence, if admissible at all and not controverted, would be conclusive evidence that the devisee was estopped by the judgment in that case." At the last trial the defense showed a power of attorney from Kapiolani, authorizing the administrator to manage her business, collect rents and income from lands that came to her under her husband's will and from those held by his trustees for payment of his debts, to manage the lands and to lease part of them at reasonable rental; "and for the purposes aforesaid" granting the attorney power to execute instruments "according to our agreement and to sue or to defend all cases at law or in equity." The defendant claims that this made the evidence admissible, as to engaging counsel to defend the case, showing that the administrator in so doing was acting under his power of attorney. Several considerations interfere with and perhaps preclude this inference. Express authority was unnecessary for under the circumstances of this case the law authorized the administrator thus to protect the interests of the estate. The power of attorney authorized the defense of cases "for me and in my name." This was not such a case. But we prefer not to decide this question upon mere inference but as a matter of law. On the reasoning in *Castle v. Kapiolani Estate*, supra, a defense in the tenant's name is not enough to bind the landlord. In *Un Wong v. Kan Chu et al.*, 5 Ib. 225, ejectment against a lessee who had sublet to persons not made defendants, a nonsuit because the defendants "were shown not to be in possession of the premises," was held to have been properly refused. The court, while holding that it was sufficient that the occupants held under the defendants, said:

"Of course the judgment will only be operative against such persons as are made parties to the suit."

As said in *Mossman v. Hawaiian Government*, 10 Ib. 421, "The general rule is that a judgment is void as to one entitled to be heard who had no notice, actual or constructive; but if there was notice, then as to the subject of the proceeding the judgment is in every other proceeding conclusive, not only upon every point that was litigated in the first proceeding, but upon every point that might have been litigated; but as to a different subject, the judgment is conclusive only upon points actually contested and adjudicated in the first proceeding." The notice here meant is equivalent to a process, being the judge's order to appear and show claims at final distribution of an estate.

The numerous American decisions which hold that when a covenantor, sued in ejectment by an adverse claimant, notifies the covenantor of the action and requests him to defend the latter is bound by the judgment, "would seem necessarily to assume that in the states in which they were rendered some provision of law or some practice existed by which the covenantor, when notified to appear, could procure himself to be admitted as a party defendant to the suit." Maupin, Marketable Title, Sec. 175.

We have no statute or practice which conforms with equity practice in respect of interests affected by a case by enabling a tenant to substitute his landlord as defendant in ejectment or the landlord, on his own petition, to become defendant. If the defendant, after notifying his landlord and giving him an opportunity to defend the action, is evicted his failure to defend may estop him as against the tenant from disputing the eviction; but under our statutes and practice the estoppel ends there. We therefore reaffirm, without modification, the rule in *Castle v. Kapiolani Estate*, "if a plaintiff wishes to secure a judgment to bind the landlord, he must make him a party, since in no other way can he compel him to appear or become defaulted."

It follows from these conclusions that the court correctly excluded evidence that the administrator retained counsel and

denied the defendant's requests for instructions framed upon his theory of these matters, as well as requests, based upon the same grounds, for a directed verdict and judgment non obstante.

The defendant presented, and the court refused to admit as evidence, the notes of the judge and his charge to the jury in the Okuu trial to show the testimony both of Okuu and of the witnesses. The defendant claims that the notes and charge ought to have been admitted because Okuu's evidence, he having since died, would be in the nature of declarations concerning pedigree, and because the judge's recital of evidence in his charge, which by statute was required to be in writing, was official. We know no rule for thus perpetuating evidence or which makes this an instance of declarations concerning pedigree made by a deceased member of the family.

Evidence that Okuu and Kahoopuipui were reputed to be living in wedlock having been given by the defendant as part of his proof of their marriage, the plaintiff could meet the evidence by showing their reputation of living together illicitly. Thus "where marriage is attempted to be established by reputation we think the defendant might be allowed to weaken the evidence by showing that the reputation was not general but was divided." *Northrop v. Knowles*, 52 Conn. 524.

Iaukea testified for the plaintiff that while secretary for the king's chamberlain he knew them as retainers at the court and by general reputation there that they were living illicitly. We have no doubt that the general reputation at court of their way of living was evidence. "It matters not that the witnesses had only known the deceased in prison. There was a large community there, and a man can have a general character there as well as elsewhere." *Thomas v. People*, 67 N. Y. 224. Reputation is "an honest reflection of the opinion of the people generally in the neighborhood where the person lives and is known." *Brown v. U. S.*, 164 U. S. 224.

The above rulings on evidence apply to the defendant's exceptions to the evidence of ill repute and the exclusion of the judge's notes and charge in the Okuu trial.

An important question in this case, on which the plaintiff's brief or argument throws little light, is the admissibility of the evidence of Rev. H. H. Parker, pastor of Kawaiahao church, that the church authorities, including himself, remonstrated with Kahoopuipui for living with Okuu without marrying him; that she did not observe their monitions and was therefore expelled from the church by removing her name from the list of its members.

The defendant claims that the fact of expulsion from the church was *res inter alios* and not evidence of the woman's unlawful mode of living. The plaintiff says that it was one of the circumstances surrounding the transaction and explanatory of the main facts and that it showed her general reputation. The action of the church in dismissing her from membership was unnecessary for explaining the evidential facts to which the witness had testified, namely, the remonstrance with her, her tacit acquiescence in the charge and her continuing the illicit relation. No logical reasoning, no theory of hearsay or *res gesta* makes this action of the church a probative fact for the jury to consider. Its admission as evidence, against the objection of the defendant, and the refusal of his request to take it from the jury was erroneous.

But we do not think that on this ground alone a new trial ought to be granted. The tendency of American decisions is to enlarge the scope in civil cases of the doctrine of harmless error in admitting evidence. Wrongful exclusion of evidence is far more likely to harm than is wrongful admission. An appellate court ought not to be so ready to order a new trial upon conjecture that the jury may have based its verdict wholly or in part upon the irrelevant testimony as in cases in which a party was not allowed to make out his case. The modern jury is apt to draw its own inferences from evidence before it rather than to adopt the conclusions of an ecclesiastical tribunal. The case has had two trials with the same result, although the expulsion was not shown at the former trial. The judge who tried the case

had time after the verdict to reconsider his ruling and in denying a new trial probably thought that the verdict was right. A trial judge properly refuses a new trial for admission of irrelevant testimony if he thinks that upon the other evidence the verdict was right and probably not influenced by the objectionable testimony, as in granting a new trial he is apt to regard the verdict as wrong.

We think that the evidence of the pastor so clearly showed that the woman was living an immoral life that it was not strengthened by his testifying that the church therefore dismissed her from membership.

By the early English rule erroneous admission or exclusion of evidence did not authorize setting aside the verdict "unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." 1 Wigmore, Evidence, Sec. 21. But about the year 1835 English courts began setting aside verdicts for admission of irrelevant testimony unless the same fact was otherwise proved. This continued until the Judicature Act of 1873, which restored the original rule, enacting that a new trial should "not be granted for improper admission or rejection of evidence unless in the opinion of the court some substantial wrong had been thereby occasioned on the trial." During forty years prior to this act "the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial." Coleridge, C. J., in *R. v. Gibson*, L. R., 18 Q. B. D. 540.

Many American courts have adhered to the original rule. Wigmore, *supra*, citing among cases examined, *State v. Beaudet*, 53 Conn. 539, "unless manifest injustice had been done on the whole case there is no ground for a new trial. There appears to be good reason for the verdict;" *Gardner v. R. Co.*, 135 Mo. 90; *People v. Fernandez*, 35 N. Y. 59; *Dyer v. Union R. Co.*, 55 Atl. (R. I.) 668; *Com. v. Lenousky*, Ib. (Pa.) 977. And see *Motes v. U. S.*, 178 U. S. 475. In *Fid. Mut. Life Assn. v.*

Mettler, 185 Ib. 320, an action to recover on insurance policies upon the life of one Hunter, it was held that evidence of a report in Hunter's family concerning his death was erroneously admitted, but "it is difficult to see that it could have been so prejudicial as to be fatal to the verdict, for it amounted to nothing more than the assertion of Mrs. Mettler's belief and the acceptance by the family of that belief as their own. In other words, it cannot be supposed that the jury regarded the evidence as tending to establish the fact of death when it purported only to state Mrs. Mettler's belief and the family's concurrence."

This court in several cases has declined to order a new trial for errors which appeared to it to be harmless. Thus in *Merri-court v. Norwalk Fire Ins. Co.*, 13 Haw. 221, "Although we do find that the trial judge was clearly in error in some of the rulings on the admission and exclusion of evidence complained of, still we do not consider these errors of sufficient gravity to justify us in setting aside the unanimous verdict of the jury and remanding the cause for a new trial." So in *Gay v. Farley*, 16 Ib. 79, in respect of certain evidence of doubtful relevancy, "the error was harmless, for not only was there ample other uncontradicted evidence to require the findings as to the fact and the amount of the shortage, but some of that evidence consisted of admissions, as to both the fact and the amount of the shortage, made by Wright before his resignation and in connection with his official duties, so that the admissions objected to were at most merely cumulative." Upon an erroneous exclusion of evidence in *Territory v. Wright*, Ib. 144, "We cannot, however, say that its exclusion was prejudicial to the defendant or was reversible error, the defendant having substantially admitted the receipt of the money." In *Wong Hoon Kan v. Lui Yan*, Ib. 736, upon the same subject, "If it was error to allow this question, the error was harmless, for the issuance of the warrant and the arrest of the plaintiff on defendant's complaint were fully shown otherwise."

As a general rule we think that new trials ought not to be granted for errors in rulings upon evidence when there is no reason to believe that they affected the verdict.

The defendant's exception to an instruction upon the presumption of continuance of illicit relations was not relied upon and is untenable, *Godfrey v. Rowland*, Ib. 387, as is also his exception to the admission in evidence of a lease of the land by the king's trustees which was "evidence of claim of ownership and acts of ownership." *Kapiolani Estate v. Thurston*, Ib. 475. His exceptions to instructions as to adverse possession were abandoned in argument.

Exceptions overruled.

W. A. Kinney and S. H. Derby (Kinney, McClanahan & Cooper on the brief) for plaintiff.

D. L. Withington (Castle & Withington on the brief) for defendant.

W. W. AHANA, C. AH CHOW, TAI YUEN AND JACK SAM, PARTNERS UNDER THE NAME OF KWONG FUNG WAI COMPANY, *v.* W. WA YAT, LAM YIP AND WONG KWAI.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JANUARY 18, 1906. DECIDED JANUARY 25, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MASTER'S REPORT—*not disturbed unless error is clear.*

A master's report of findings of fact ought not to be disturbed except upon a clear showing of error, especially if the reference is made by consent for a decision on the facts.

COSTS IN EQUITY—*largely in discretion of trial judge.*

Whether costs in equity should be taxed to plaintiff or defendant or divided is a matter largely in the discretion of the trial judge.

LACHES—in prosecuting motion for confirmation of report, held not fatal.

Plaintiffs filed exceptions to the master's report and defendants moved for confirmation and the matter was continued until move 1 on; defendants moved it on six years afterwards. Held, it does not lie with plaintiffs to urge defendants' laches against confirmation.

OPINION OF THE COURT BY FREAR, C.J.

This bill in equity for an accounting and an injunction was filed July 13, 1897. The plaintiffs' theory is that in November, 1896, the defendant Wa Yat and others then members of the partnership sold out to the plaintiffs, who were to assume the indebtedness of the partnership and pay the difference between that and the value of the partnership property which was estimated at \$10,500, but that, since the settlement had to be made immediately and the amount of indebtedness could not be definitely ascertained at once, the indebtedness was assumed tentatively to be \$8,770.20 and the plaintiffs gave their notes to Wa Yat for the difference between that and the value of the property, namely, \$1729.80, on the understanding that if the indebtedness should be found greater the excess should be credited on the notes. It is alleged that an excess of about \$600 should be so credited. The defendants' theory is that the property was valued at \$18,000 and that there was no such understanding as the plaintiffs allege, but that the amount of the notes was made up of an existing debt of \$1100 due from the other members of the firm to Wa Yat, \$329.80 interest accrued on said \$1100, and \$300 the value of Wa Yat's remaining interest in the partnership.

On May 11, 1898, the parties stipulated that the "matters in controversy" and "the accounts involved may be referred to Kan Wing Chew, to hear and decide upon the facts and merits of the case, reporting his decision to the court," and two days later, in pursuance of the stipulation, Kan Wing Chew was appointed to "hear and decide upon the facts and merits of the

above entitled cause, reporting his decision therein to the court." Soon afterwards the master, arbitrator or referee, as he is variously called, began to take evidence, and on July 25, 1899, filed his report, dated July 24, 1899, and also the evidence taken by him.

The substance of the report was that in 1890 the defendant Wa Yat and another leased lands at Waialua, Oahu, and started a rice plantation there, but that afterwards Wa Yt bought out his partner for \$550; that in August, 1894, he took in four other partners, who had one share each, Wa Yat retaining two shares, on a basis of \$10,500; that in October, 1895, four more persons, including the plaintiff Ahana, were admitted into the partnership; that on November 23 or 24, 1896, Ahana bought out Wa Yat, and perhaps others also, and gave to Wa Yat the notes in question signed in the firm name, the first and second of which for \$100 and \$129.80 respectively were paid when due, but the others of which, one for \$300 and three for \$400 each, amounting to \$1500, were not paid when due, on the ground that the account of the company was incorrect and that Wa Yat had not summed up the same; that some time in 1897 he induced Wa Yat to make a memorandum on the first page of the cash book to the effect that on July 1, 1894, the company consisted of six shares, that the business was valued at \$10,500, that after deducting the debts of the old company the balance should be paid to Wa Yat, that if the company should have paid more than the above amount Wa Yat should refund the difference to it but the company should assume all accounts after said date and should not deduct any amount for debts from said \$10,500. The master stated that the evidence was conflicting and gave reasons for discrediting some of the plaintiffs' testimony, also that he had made a thorough examination of all the account books, 28 in number, produced before him, and found that the partnership indebtedness on July 1, 1894, was \$9,530.70, which, deducted from \$10,500, left \$969.30 due Wa Yat; also that there was due Wa Yat \$278.77 interest thereon to November 23, 1896, and \$168.90 wages advanced by Wa Yat after July 1,

1894, and \$188.35 amount overdrawn from Wa Yat on general account, making a total of \$1605.32, from which he deducted \$50.35, an amount entered twice by mistake in the cash book, and \$229.80 the amount of the two notes paid, leaving \$1325.17, which with interest, \$212.03, from November 24, 1896, to July 24, 1899, amounted to \$1537.20, for which amount and costs he gave judgment in favor of Wa Yat, the other defendants having no further interest in the matter, they having settled with Wa Yat.

On August 23, 1899, the defendants moved that the "arbitrator's" award be entered up as a judgment and on the same day the plaintiff Ahana excepted to the "decision and report" of the "arbitrator" on the grounds (1) that it was contrary to the law and the evidence; (2) that it did not appear that the arbitrator had made any proper account of the transactions involved in the suit; (3) that no opportunity had been given to the plaintiffs to inspect the books with reference to the items which the arbitrator found against the plaintiffs and that no hearing had been had with reference thereto, and that no opportunity had been given to object thereto; and (4) that the costs should not be awarded against the plaintiffs. In support of the third ground an affidavit by Ahana was filed to the effect that he did not know that the arbitrator had made any account from the books left in his hands; that he never had an opportunity to object to any of the items allowed and that no hearing was had with reference to the said account. On the same day the matter was ordered continued until moved on and no further proceedings were had until July 15, 1905, when Wa Yat moved to set the matter for hearing for the purpose of confirming the report and further necessary proceedings. The matter came up for hearing September 9, 1905, and was submitted on briefs to be filed thereafter, and after the filing thereof the circuit judge overruled the exceptions and confirmed the report and findings of the master on December 11, 1905. The plaintiffs appealed.

The master's findings of fact should not be disturbed without clear proof of error or mistake on his part. *Monting v. Leong*

Kau, 7 Haw. 486; *Est. of Cummins*, 16 Id. 185. Especially true is this when, as in the present case, the reference was made by consent of the parties to decide the facts. *Davis v. Schwartz*, 155 U. S. 631. We cannot say in this case that the findings were contrary to the law and the evidence, which is the first ground of exception, or that the circuit judge erred in overruling this exception.

The second exception, namely, that it does not appear that the master made any proper account of the transactions involved in the suit, is equally unsustainable. It appears that he made a careful examination of the accounts and made findings thereon that are not shown to be erroneous.

The third exception, that no opportunity was given the plaintiffs to inspect the books with reference to the items found against them, that no hearing was had with reference thereto and no opportunity given to object thereto, is equally without merit. The affidavit in support of this exception is too indefinite and is wholly insufficient. The plaintiffs had long had possession of the books and it was their duty to point out any inaccuracies or errors in them. They were present and represented by counsel at hearings. It does not appear that any application was made by them or denied for an opportunity to inspect the books or to object to findings thereon or for a hearing with reference thereto, nor has it been shown before the circuit judge or here that the items found by the master were erroneous.

The matter of costs was largely in the discretion of the circuit judge, and we do not see sufficient reason for setting aside his ruling based on the recommendation of the master in this respect.

In addition to the exceptions to the report the appellants urge that the defendants ought not to be heard on their motion for a confirmation of the report because of their laches in asking for a hearing upon that motion. This point also was properly overruled by the circuit judge. The case was begun by the plaintiffs and it was their duty quite as much as that of the

defendants to proceed with reasonable diligence in the case. They are hardly in a position to invoke the doctrine of laches against the defendants, particularly under all the circumstances referred to above.

The decree appealed from is affirmed.

J. A. Magoon and *J. Lightfoot* for plaintiff Ahana.

C. W. Ashford for defendants.

TERRITORY OF HAWAII v. AH CHOY AND AH TUCK.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU ON
POINTS OF LAW.

ARGUED JANUARY 31, 1906.

DECIDED FEBRUARY 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COUNTY ORDINANCE—*prohibiting spraying clothes in laundering them by water projected from the mouth—not unreasonable and not class legislation.*

A county ordinance prohibiting laundrymen from spraying clothes with water projected from the mouth is not invalid on the grounds that it is unreasonable or is class legislation directed against Chinese.

Id.—*imprisonment for nonpayment of a fine for violation of ordinance.*

Imprisonment cannot lawfully be imposed for nonpayment of a fine for violation of this ordinance.

OPINION OF THE COURT BY HARTWELL, J.

The defendants were convicted and sentenced to pay a fine of \$5 each and \$1.15 costs by the district magistrate of Honolulu upon a charge of violating an ordinance of the county of Oahu made by its board of supervisors against spraying clothes with liquid projected from the mouth.

The defendants appealed from the judgment upon points of law, viz.: "That said judgment is illegal and invalid because:

1. That this Court has no jurisdiction of or concerning the charge entered against the defendants, or of the subject matter of said cause.

2. That said charge sets forth no offense under any law of the Territory of Hawaii.

3. That the District Court has no power or authority to add costs to the fine imposed in and by said judgment.

4. That the ordinance alleged in and by the charge herein to have been violated by these defendants is null and void, because the Board of Supervisors of the County of Oahu had no power or authority to prescribe imprisonment as a punishment for the violation of any ordinance made or enacted by it; that said ordinance is an illegal discrimination against Chinese laundrymen, and an unreasonable regulation and beyond the power of said Board of Supervisors to make, pass or enact."

The defendants' contention may thus be summarized: (1) This method of spraying clothes cannot lawfully be prohibited; it not appearing to be injurious to health its prohibition is not a health regulation made in the exercise of police powers of sanitation or any other police power and is unreasonable; (2) as Chinese only use this method its prohibition is made against them and is class legislation; (3) the County Act gives no power to the board of supervisors to require imprisonment for nonpayment of fines imposed, for violation of its ordinances. The ordinance is therefore radically defective; the part which authorizes a fine cannot be treated separately from the concluding part of the same sentence which requires imprisonment for nonpayment of fine. It is not a case of fine or imprisonment in which the former might be valid if the latter were invalid but the imprisonment is a necessary consequence of nonpayment of the fine.

The defendants abandoned in argument their first and third points of law.

The following is the ordinance in question:

"Section 1. It shall be unlawful for any person or persons, ironing or performing any act, in the laundrying of clothing of another, or in the laundrying of clothing for hire, within the

County of Oahu, to spray any article so laundered with liquid sprayed or projected from the mouth of said person or persons, or to direct or permit any person in his employ to so spray such article so laundered.

"Section 2. Any person violating any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined not less than Five Dollars, nor more than Twenty-Five Dollars and in case such fine is not satisfied by immediate payment thereof the person so fined shall be committed to prison for the nonpayment of the same and the time of such imprisonment shall be deemed to discharge the same at the rate of One Dollar per day.

"Section 3. This Ordinance shall take effect from and after its passage and publication."

The defendants submit that if the ordinance were a sincere attempt to guard the public health and not a covert blow at Chinese laundrymen or based on merely sentimental and frivolous considerations its operation would have been confined to the actual danger of clothes spraying from the mouths of diseased persons and would prohibit every kind of laundering and the handling of laundry things by diseased persons. No one, the argument continues, has ever heard, and there is no evidence, of harm from the practice; on the contrary there is undisputed evidence that none has been known.

It is often the duty of the court to consider not only the ostensible object of police ordinances of this kind but their real motive and when it is apparent that they are based on anti-Chinese grounds and are a device for removing the competition or the presence from the community of persons of Chinese nationality who in common with all others are under the protection of the United States Constitution, it is the duty of the court, which we should not hesitate to perform, to declare them to be void.

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of

equal justice is still within the prohibition of the Constitution." *Fick Wo v. Hopkins*, 118 U. S. 356. Thus an ordinance was held to be invalid which provided that every male convict imprisoned in the county jail should have the hair of his head cut or clipped to an uniform length of one inch from the scalp, Field, J., saying: "The class character of this legislation is none the less manifest because of the general terms in which it is expressed. * * * Where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect, or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation and treat it accordingly." *Ho Ah Kow v. Nunan*, Fed. Cas. 6546. Again, a health ordinance was held to be unreasonable, and therefore void, which prohibited the sale of second-hand clothing and bed furniture, the court saying: "The sale of second-hand clothing is not a nuisance per se, but is on the other hand a lawful business, and under proper regulations may be so conducted as to be without danger to the health of the community, and at the same time to be a great benefit to a large portion of the people. There is nothing dangerous to health in articles of second-hand clothing of themselves; they can only become noxious by reason of prior use, of having been worn or possessed by persons themselves infected, or living in infected communities." *State v. Taft*, 118 N. C. 1190.

Undoubtedly the ordinance in question stops far short of being a thorough and indiscriminating attempt to remove causes of infection from laundry work and in beginning with Chinese laundries it may be, although we hope not, that harrying Chinese was in the minds of those who urged or made it, but this is not a case in which to apply the saying, "First cast out the beam which is in thine own eye," for the thing sought to be prevented is undoubtedly an unwholesome and unsanitary practice. The facility with which germs of disease are communicated by the saliva is common knowledge. It is impossible

to guard against the danger of infection from this spraying process by anything less than its absolute prohibition, hence we cannot say that the ordinance is unreasonable or because of its application to Chinese only that it is class legislation. The 14th Amendment is not intended to secure immunity from such practice on the sole ground that it is indulged in by Chinese only.

The first and second objections to the ordinance are not sustained.

The objection that the ordinance makes imprisonment a necessary although indirect consequence of its violation would be conclusive against its validity if such were the fact for the County Act does not authorize this either expressly or by necessary implication; but although worded in the conjunctive, the ordinance requires the alternative either of payment of the fine or imprisonment in case of its nonpayment.

Imprisonment cannot lawfully be imposed either as a direct penalty or indirectly as a consequence of nonpayment of fine, unless authorized expressly or by necessary implication. *Territory v. Whitney*, ante p. 181. In *Natal v. Louisiana*, 139 U. S. 623, the city council of New Orleans was "vested with full power to provide for the enforcement" of its ordinances. Upon the contention that the ordinance was contrary to the 14th Amendment in depriving the plaintiffs in error of liberty and property without due process of law the court held that the penalty of a fine of \$25 and of imprisonment of not more than thirty days if the fine was not paid "was within the authority constitutionally conferred upon the city council." The County Act (Sec. 62) merely authorizes the board of supervisors to "fix a penalty" for violation of its ordinances. "As this sanction would be futile against impecunious offenders, it is generally provided that imprisonment may be inflicted in default of payment of the fine and the costs of the prosecution;" but "only express and precise authority will justify such imprisonment." *Smith, Mun. Corp.*, Sec. 549.

The judgment of a fine of \$5 and \$1.15 costs in the case of each defendant is affirmed. A commitment upon this judgment would be invalid.

E. A. Douthitt, County Attorney, for the Territory.

A. G. M. Robertson for defendants.

IN THE MATTER OF THE GRAND JURY DULY
IMPANELED AND SWORN IN AND FOR THE
CIRCUIT COURT OF THE FIRST JUDICIAL CIR-
CUIT, TERRITORY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 6, 1906. DECIDED FEBRUARY 6, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

DIRECT CRIMINAL CONTEMPT—*refusal to answer question before grand jury.*

A refusal of a witness sworn to testify before a grand jury to answer a proper question is a direct criminal contempt.

Id.—*exceptions do not lie.*

Exceptions do not lie to review a judgment of a circuit court in a case of direct criminal contempt.

ORAL OPINION.

FREAR, C. J. The appellant refused to answer a question put to him as a witness before the grand jury. For this he was found guilty of contempt by the circuit court and sentenced to imprisonment for ten days or until such time as he should purge himself of the contempt. He seeks a reversal of the judgment on exceptions, and the question is whether exceptions lie in a case of this nature.

It has been settled by former decisions that prior to the act of 1903 an appeal did not lie in a contempt case. That was held

in *Onomea Sugar Co. v. Austin*, 5 Haw. 604, the court basing its decision partly on the ground that no distinction could be made between direct and indirect contempts under the statute relating to appeals, and that to allow appeals in cases of direct contempt would be to render nugatory an essential power of the courts, and that such remedy did not exist at common law and should not be held to exist under the statute unless a clear intention were shown to that effect; and partly on the ground that the statute, which is now Section 1860 of the Revised Laws, expressly provided that appeals should not be allowed in certain classes of cases, to one of which it was held that contempt cases belonged. See also *In re Davis*, 11 Haw. 598; *Ex parte Ah Oi*, 13 Haw. 539; *Ex parte Smith*, 14 Haw. 247.

The question then is whether the act of 1903, the portion of which now in question is embodied in Sec. 3073 of the Revised Laws, permits a remedy of this sort—by appeal or exceptions or writ of error—in a case of contempt of this kind. That section certainly does not give any such remedy in its second sentence. That sentence simply provides that in any case of contempt the particular circumstances of the offense shall be fully set forth in the judgment and warrant of commitment and that “on appeal, exceptions, writ of error, habeas corpus or other proceedings” for the review of the judgment or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment or order the commitment. That sentence relates to the procedure on these various proceedings when they are applicable. It does not grant the right to review decisions in any contempt cases by these various methods. The next sentence, however, provides that “every judgment, sentence or commitment for a civil contempt or for a constructive or indirect criminal contempt shall be subject to appeal, exceptions, writ of error or other proceeding for review as provided by law in other cases,” with the proviso that only questions of law should be considered in such cases and that nothing in this section should be construed to “prohibit the review of proceedings in any case of contempt * * * on habeas corpus or otherwise as heretofore

allowed." This provision, as far as it goes, strengthens the view that an appeal, exceptions or writ of error would not lie now any more than before in a case of direct criminal contempt, for it expressly permits those methods of review only in cases of indirect or constructive criminal contempt and in cases of civil contempt.

The question therefore is reduced to this, whether this was a case of direct criminal contempt, if it was a case of contempt at all. In the opinion of the court it was. There is no doubt that it was a direct contempt. Although it occurred in the grand jury room, the court in contemplation of law was present there. It was also a criminal contempt. It was a disregard of the authority of the court in a public proceeding. The purpose of its prosecution was the vindication and enforcement of public authority and not merely the enforcement of a private right. It is even made a criminal offense for one sworn as a witness to refuse to answer any legal and proper interrogatories. Rev. L., Sec. 3069.

The exceptions are dismissed.

A. S. Humphreys for appellant.

F. W. Milverton, Deputy Attorney General, contra, was not called.

IN THE MATTER OF THE PETITION OF Y. ANIN
FOR A WRIT OF HABEAS CORPUS.

ORIGINAL.

ARGUED FEBRUARY 7, 1906. DECIDED FEBRUARY 7, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

HABEAS CORPUS—contempt—refusal to answer question of grand jury because self incriminating and immaterial—adjudication in defendant's absence.

The petitioner, having refused to answer the grand jury's question whether he was maintaining a gambling game on the grounds that it might injure him to answer and that the question was immaterial, was cited to appear and appeared before the judge to show cause why he should not be punished for contempt. The judge, after hearing the case, orally sentenced him to ten days' imprisonment or until he should purge himself of contempt by answering the question. Upon the afternoon of the same day the judge signed an order which was filed the following day formally adjudging the relator to be guilty of contempt and sentencing him as aforesaid, it not appearing that the defendant was then present. Held: The witness could be compelled to answer, as the statute exempts him from prosecution on account of his testimony and as a witness has no privilege at common law to decline to answer immaterial questions; also, the adjudication was properly made although the defendant was not present.

ORAL OPINION.

HARTWELL, J. There are three questions requiring adjudication in this case, namely: (1) Upon the relator's claim that he could not be required to answer the question propounded to him by the grand jury, because to do so might incriminate himself; and (2) because the question was upon an immaterial matter; and (3) that no adjudication of contempt was made.

At the argument on the second question, I drew the attention of counsel to legislation upon the subject in certain states, and to the rule of common law, in the absence of controlling legislation, that a witness is not privileged to decline to answer an immaterial question.

It is stated in Wigmore on Evidence, Sec. 2210, that there are nine states and one territory which have such legislation superseding the common law. For instance, the California statute, which, I take it, is a specimen of the legislation in other states, requires not only that the witness answer questions legal and pertinent to the matter in issue, but that it is his right to be protected from irrelevant questions and to be examined only as to matters legal and pertinent to the issue. The states having such legislation are California, Idaho, Oregon, Georgia, Alabama, Montana, Mississippi, Utah and Nevada.

The common law rule being in force here, the fact that the question was immaterial, if it was so, which we do not decide, would not make the restraint illegal. The effect of the statute which precludes prosecution of a witness in consequence of testimony he may give which might incriminate himself is to take from him the privilege of declining to answer on that ground. That leaves for consideration the objection that no judgment was entered.

In habeas corpus it is only when a judgment is void that the party restrained of his liberty is set at large. This rule has been laid down in several decisions, as, for instance, *Ex parte Oriemon*, 13 Haw. 107. The writ is not used to correct errors. The circuit court had jurisdiction of the general subject of contempts, of the particular contempt charged and of the defendant's person when the charge was made and considered. The return recites that at two o'clock in the afternoon of February 1, the defendant being present in the court room as commanded by the citation, and no good cause being shown to the court by him why he should not be punished for contempt, it was ordered and adjudged that he was guilty of contempt and sentenced to imprisonment and jail for the term of ten days or until such time as he should purge himself of such contempt.

We are not sure that the oral testimony that at the end of the argument, and in the defendant's presence, the judge said "The defendant is sentenced to imprisonment for ten days or until he purges himself of the contempt," but did not then adjudge the defendant guilty of contempt, refers to this afternoon proceeding; but taking the testimony as showing that the defendant was not present when this particular judgment I have referred to was signed, or on the next day when it was filed, the question therefore is whether the judgment under such circumstances could be pronounced in the absence from the court room of the defendant. We think that the *Terry* case disposes of the question. *Ex parte Terry*, 128 U. S. 289. The fact in that case was that Terry had gone out of the court room into another room in the building when the adjudication of contempt was made.

This judgment then cannot be declared to be void. The petitioner is remanded accordingly.

A. S. Humphreys and F. E. Thompson for the petitioner.

F. W. Milverton, Deputy Attorney General, for the Territory.

IN THE MATTER OF THE PETITION OF Y. ANIN
FOR A WRIT OF HABEAS CORPUS.

ORIGINAL.

ARGUED FEBRUARY 9, 1906.

DECIDED FEBRUARY 9, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

OATH OF SECRECY—*to witness before grand jury, not authorized.*

An oath of secrecy cannot be required of a witness before a grand jury by one of the judges of the circuit court of the first circuit.

CONTEMPT—*violation by witness of unauthorized oath, not.*

It is not a contempt of court for a witness before a grand jury to violate an oath of secrecy which was unauthorized, and one imprisoned for such alleged contempt may be released on habeas corpus.

ORAL OPINION.

FREAR, C.J. The petitioner seeks release from imprisonment under a judgment and sentence of the circuit court for contempt in violating an oath of secrecy taken by him as a witness before the grand jury.

Of the questions suggested by the record, the only one that need be considered is whether the oath of secrecy was authorized or required by law. If it was not, there was no contempt of court.

The clause of secrecy in the oath was prescribed by a single judge of the circuit court, not by any general rule of the circuit court or of the circuit courts.

The Organic Act provides, in section 83, that the method of the presentation of cases to grand juries shall be prescribed by the supreme court of the Territory, and in pursuance of that power or duty the supreme court has prescribed, by Rule 14 of the rules relating to grand juries, the form of oath to be administered to witnesses before grand juries—which does not contain a clause of secrecy. It is at least a question whether this provision of the Organic Act and the rule made in pursuance of it are not exclusive. But, however that may be, in the opinion of the court, the judge of the circuit court who prescribed the clause of secrecy was without authority of law to make that requirement. In the absence of any law or rule authorized by law requiring an oath of secrecy and in the absence of any legal order against divulging the transactions of the grand jury, there could be no contempt of court in divulging such secrets on the part of a witness before the grand jury.

Accordingly the writ must be allowed and the petitioner discharged from custody, and it is so ordered.

Thompson & Clemons and *A. S. Humphreys* for petitioner were not called.

F. W. Milverton, Deputy Attorney General, contra.

JAMES ARMSTRONG AND L. L. McCANDLESS *v.* ANE
KEONE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 6, 1906. DECIDED FEBRUARY 12, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

SPECIFIC PERFORMANCE—*defendant's misunderstanding of agreement—whether induced by plaintiffs or not—unfairness of agreement.*

A bill to enforce performance of a written agreement to partition land was dismissed because of its unfairness and of the defend-

ant's apparent mistake as to its contents. Held: The decree is affirmed, the evidence justifying a finding that the written agreement sought to be enforced did not conform to the oral agreement or to the defendant's understanding of its contents in failing to provide that the land apportioned to her should be that on which her house stood.

OPINION OF THE COURT BY HARTWELL, J.

This is an appeal from a decree dismissing the plaintiffs' bill to enforce performance of an agreement of partition made between the parties November 28, 1905. The land being in two parcels is thus described in the agreement:

"1—90-100 of an acre conveyed by the Oahu Railway and Land Co., Ltd., to Ane Keone and John Polipua Keone by Deed recorded in Liber 130, page 370.

"2—About 2 8-10 acres in Kaohai, Manana, Ewa, Oahu, being the unsold portion of Apana 5, R. P. 4497 on L. C. A. 8557 to C. Kanaina."

By the agreement, "The first piece to be divided as follows:

"A piece at the South West corner of said piece shall be set apart for the party of the first part, as follows:

"Starting at the South West Corner of the whole piece, running along Apana 2, L. C. A. 8305 75 feet, thence running North Westerly parallel to line along the Bishop Estate land 100 feet, thence running parallel to the first line 75 feet, to the Bishop Estate boundary line, thence along Bishop Estate land to the initial point, containing an area of 7500 square feet more or less; with a permanent right of way of ten feet in width from the South East Corner of the piece hereby set apart for said party of the first part (the defendant) to the Railroad line.

"The rest of the piece to be set apart for the parties of the second part (plaintiffs).

"2—That Apana 2 in this Agreement to be divided as follows to wit:

"12-28 parts of said piece along Apana 2 of L. C. A. 8305 No. 6 to Uaua to be set apart for the party of the first part; and 16-28 parts of said piece along Apana 4, L. C. A. 7447 to Kuheleloa to be set apart for the parties of the second part."

The bill avers that the plaintiffs had brought suit for partition of one of the pieces but, on the strength of the agreement of November 28, 1905, withdrew it and engaged a surveyor who

surveyed the land December 4, 1905, and the next day engaged attorneys who prepared the partition papers which, on the afternoon of that day, the defendant notified them that she would not sign.

The answer denies that the surveyor was employed to make a survey in accordance with any agreement between the parties and avers that the instructions given him were not in accordance with the division agreed upon, which, as averred, were that the first piece should be so divided that the defendant would have a portion containing 7500 square feet which should include certain buildings and improvements erected thereon by her of the value of \$1000; that the plaintiffs reduced to writing what they represented to the defendant to be the oral contract; that the defendant is a comparatively ignorant Hawaiian woman with little or no knowledge of business, slightly acquainted with the English language and wholly unable to read it, having no acquaintance with the terms used in describing boundaries of land; that each of the plaintiffs "is a hard headed, shrewd business man, thoroughly acquainted with the English language" and that they assured her that the written agreement secured her the house lot, buildings and improvements thereon and that the agreement, which was in English, was not read and explained to her; that relying upon this assurance she executed the agreement in full belief that it secured to her what had been orally agreed upon; that soon after the surveyor laid out the lines for the division as outlined in the written contract the defendant learned to her great surprise that the written contract gave her a piece of land 75 x 100 feet which contained no improvements and was worth not more than \$100 and gave the plaintiffs a piece of land four times as great and which included the buildings and improvements, being worth not less than \$1600, whereupon she refused to execute the deed, averring that the written contract is absolutely unfair, one sided, unjust and unconscionable; that in entering into it the defendant was overreached by the plaintiffs and that the plaintiffs obtained the execution of the agreement by sharp and unscrupulous methods by which she would receive for her share of one

of the parcels 7500 square feet wholly unimproved and the plaintiffs 36194 square feet containing the improvements of the value of \$1000 erected and paid for by the defendant and worth not less than \$1600, and that the plaintiffs would receive 16-28 of the other parcel.

Judge De Bolt, who tried the cause, dismissed the bill by reason of the "apparent unfairness (of the agreement) and of the undoubted mistake."

The testimony fully authorizes a finding that the defendant understood that the portion of the first lot which she was to have was that on which her house stood and that she believed that the written agreement, written in the English language which she could not read, so provided, her attorney, as he says, merely telling her that it was "all right," and leaving the plaintiffs' attorney to explain it; also that the effect of the written agreement was to place the defendant at great disadvantage in the division far from being compensated by the plaintiffs' agreement to pay costs (about \$10) in their partition case, which they discontinued, the surveyor's fee (\$28.50), their own attorney's fee, which the defendant was in no way responsible for, and \$50 for the defendant's attorney.

The result of a partition suit would have been far better for the defendant as the judge might of his own motion have directed a surveyor to set apart for her in one lot an equal portion on which her house should stand, and an equal portion on the other lot. The expense of this would have been inconsiderable. The plaintiffs' offer to allow the defendant to remove her house, which by the written agreement would be left partly on the division line, is not enough in view of the evidence that it would have to be removed to a less desirable location.

Equity will not compel a defendant to perform a contract which was made by mistake of its contents, or which he "did not intend to make or which he would not have entered into had its true effect been understood," and this whether the mistake was "either intentionally or not induced or made probable, or even possible, by the acts or omissions of the plaintiff." "A mistake which is entirely the defendant's own or that of his agent and for which the plaintiff is not directly or indirectly

responsible may be proved in defense and may defeat a specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake." 4 *Pomeroy's Eq. Jur.*, 3d Ed., Sec. 1045; 2 *Ib.*, Sec. 860; *Peterson v. Lazarus*, 7 Haw. 129.

No cause appears for reversing the decree appealed from, which is affirmed.

W. C. Achi for plaintiffs.

R. W. Breckons for defendant.

KAPIOLANI ESTATE, LTD., v. LORRIN A. THURSTON

PETITION FOR REHEARING.

ARGUED FEBRUARY 12, 1906. DECIDED FEBRUARY 28, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

REHEARING—*denied, when.*

A rehearing is denied because, although certain questions submitted at the first hearing were not without difficulty, it does not appear that the decision was clearly wrong or that it is probable that that could be shown on a rehearing—the court intimating that if that did appear a rehearing might be granted notwithstanding remarks in former cases to the effect that a rehearing would not be granted merely because the court had not overlooked arguments made or cases cited by counsel, etc.

MARRIAGE, EVIDENCE—*reputation of illicit cohabitation may be shown, when.*

Evidence that cohabitation was of an illicit nature is admissible to rebut evidence of cohabitation, acts of the parties and declarations of relatives relied on to prove marriage.

OPINION OF THE COURT BY FREAR, C.J.

This is a petition for a rehearing of the case decided ante, page 312. Argument was heard at the request of one of the members of the court in accordance with the rule.

The first ground is that the court overlooked matters decisive of the case in deciding that there was not sufficient evidence to go to the jury on the question of estoppel in pais. Under this ground objection is made particularly to the portions of the opinion which treat of the statement of Queen Kapiolani as a mere promise without consideration or a statement of intention which she had a right to change; which state that it would not have been the part of a prudent man, in his capacity of trustee, to convey the land with covenants of warranty in sole reliance upon the queen's statements, the contention being that the estoppel, if available at all, rests upon all the facts and circumstances in the case and not on any part, and that the opinion does not attempt to deal with all the facts; which state that the trustee was not obliged to expend its own money or incur personal obligations in defending suits for the land, that a trustee is never required to give covenants of warranty and that the queen's statement did not induce him to expend money to purchase the land or for improvements upon it. It is urged also that the court overlooked the main question argued on this part of the case, namely, whether there was sufficient evidence to go to the jury, rather than whether a case of estoppel was made out or not, and that in deciding this point the court overlooked cases cited by counsel. The decision, so far as the question of estoppel in pais is concerned, was based mainly on the view that the evidence was too uncertain to justify an inference by a jury that the queen's statements referred to this land, in other words, that the evidence was not sufficiently definite to warrant a finding of an estoppel. Other statements in the opinion upon the question of estoppel in pais should be read in the light of this view, or, in so far as they were made upon a different theory, they were made with a view to covering possible contentions as to the purport of the queen's statements. We do not mean to imply that the question whether there was sufficient evidence to go to the jury upon this point was free from difficulty or that it was a point upon which much could not be said upon either side, but after careful consideration the court felt obliged to take the view it did and so far as it can see it did so

without overlooking any of the contentions made by counsel. This alone might be sufficient, as contended by the appellee under remarks made in certain former opinions of the court for denying a rehearing, but we are not prepared to go to that extent. If it appeared that the decision was clearly wrong or that it was probable that that could be shown upon a rehearing, we would be loath to deny a rehearing, and we are not sure that the court has yet gone so far as to deny a rehearing under such circumstances. In the present case, although realizing the difficulty of the question submitted, we do not see reason for granting a rehearing upon this point.

The next ground in support of the petition is that the court erred in holding that the *Okuu* judgment would not be conclusive against Kapiolani and her successors in title even if counsel was employed by her or on her authority to defend the *Okuu* case. In support of this ground it is urged first that the contrary became the law of the case under the decision in 16 Haw. 475. In that decision the court said that "the evidence, if admissible at all and not controverted, would be conclusive evidence that the devisee was estopped by the judgment in that case." That remark was made in holding that the testimony which was offered to show that the attorney for the defendant in the *Okuu* case had been retained by the administrator with the will annexed of King Kalakaua, was inadmissible for the purpose of showing that Queen Kapiolani, who was Kalakaua's devisee, was bound by the judgment in the *Okuu* case, because a judgment against the administrator with the will annexed would not be binding upon the devisee inasmuch as such administrator did not represent the land or the devisee unless, as did not appear in this case, the will imposed upon him some charge or duty concerning the land. It was not held in effect, as now contended, that if the attorney had been employed by Kapiolani or by the administrator on her behalf she would have been concluded by the judgment. It was not even held that the evidence would have been admissible for the purpose of showing that the administrator with the will annexed would be bound by the judgment. The evidence in regard to Kapiolani's dealings

with the attorney, if there were any such dealings, was held inadmissible in the decision upon which a rehearing is now sought. It is urged secondly in support of this ground that the court misapplied the rule in *Castle v. Kapiolani Estate*, ante, page 61, in holding, as held in that case, that "if a plaintiff wishes to secure a judgment to bind the landlord, he must make him a party, since in no other way can he compel him to appear or become defaulted," the contention being that, reading the entire paragraph in which the quotation just made occurs in the *Castle* case, the court intended to hold that if a landlord voluntarily appeared and defended in the tenant's name, although not a party himself, he would be bound. Not only was such a ruling unnecessary for the decision of that case, but there was no attempt to make such a ruling. The furthest that the court went in that direction was to state negatively that a judgment in ejectment would not include a landlord who was not impleaded or did not defend in the defendant's name or his own. It did not hold that he would be concluded if he did defend in the defendant's name, not being a party himself.

The third ground of the petition is that the court erred in holding that evidence of reputation as to the illicit nature of Okuu's cohabitation with Kahoopuipui was admissible, the contention being that evidence of such reputation is not admissible except by way of rebuttal of evidence of reputation of marriage and that in this case the defendant-appellant did not attempt to establish marriage by reputation. No doubt if a formal marriage is proved reputation that the cohabitation was of an illicit nature would be inadmissible to disprove it, but in this case the defendant endeavored to show a marriage, as he himself states, by the declarations and acts of the parties and recognition by relatives. For instance, one witness for the defendant testified that Okuu and Kahoopuipui lived together as man and wife and that the witness heard that they were married, not from them but from other parties, parties that belonged to the family. The declarations and acts of the parties and recognition by relatives, which defendant's counsel says he

relies on, did not show a formal marriage. They were in the nature of evidence of habit and repute. It is immaterial that no witness for the defendant was asked specifically as to what the reputation was in regard to the nature of the cohabitation. The cohabitation was the main fact and the question was as to its nature. Declarations and acts of the parties and recognition by relatives and friends are, as sometimes stated, merely the shadows of the cohabitation—which indicate its nature. We know of no rule to the effect that evidence of reputation that the cohabitation was illicit is inadmissible to rebut evidence consisting of conduct and recognition tending to show that it was legal.

The fourth and last ground for the petition is that the court was misled in regard to the materiality of the evidence of Kahoopuipui's expulsion from the church on the ground that her cohabitation with Okuu was unlawful. The court held that this evidence was inadmissible, but that the error in admitting it was under the circumstances insufficient to call for a new trial. It is contended that it is only when the fact is not only proved by other evidence but is uncontradicted that the court can say that any evidence is so immaterial that its erroneous admission will not require a new trial. The court considered this phase of the case with great care and felt that its conclusion was sound in principle and supported by many other courts, and particularly by the decision in 185 U. S., from which it quoted. We are frank to say, however, that this point, as well as that in regard to estoppel in pais, was one upon which the court hesitated much. Probably the court went further than it has ever gone before in holding that the error was not such as to require a new trial, but it did so only after careful consideration and upon a belief that the move was one in the right direction.

The petition for a rehearing is denied.

D. L. Withington for defendant-petitioner; *Castle & Withington* on the petition.

S. H. Derby contra.

CONCURRING OPINION OF HARTWELL, J.

The bill of exceptions presented for adjudication the defendant's claims of (1) estoppel in pais, (2) estoppel by judgment against a lessee and (3) admission of irrelevant evidence (a) of reputation of nonmarriage of Okuu and (b) of Kahoopui-pui's dismissal from her church. The defense of the statute of limitations had been presented at the trial but failed from lack of evidence of adverse possession for the statutory period.

After mature deliberation upon each of these matters it was held that the landlord, not being a defendant in the action for other land under the same title, was not bound by the judgment against the lessee, even though she engaged an attorney to defend; that the reputation of nonmarriage was properly shown in rebuttal of the plaintiff's evidence of a reputed marriage and that the admission in evidence of the irrelevant fact of dismissal from the church did not require the verdict to be set aside.

As to the estoppel in pais, it was held that Kapiolani's statement to Mr. Castle did not clearly enough show that she referred to the land in controversy, although Mr. Castle believed that it did, to go to the jury and that if the evidence had been clear enough to authorize a finding by the jury that she referred to this land it did not constitute an estoppel in pais for several reasons, among others, because she was not aware that the purpose of Mr. Castle's inquiry was to learn whether he would be safe in warranting the title to future purchasers,—a thing which a trustee is not expected to do. To warrant the title on the strength of her statement was not, as we thought, the course which a prudent person would ordinarily take. Without intimating that sole reliance on such statement was required, it is obvious that the warranty was not made in sole reliance upon it, since the other defenses made at the trial would properly have been relied upon, particularly Mr. Castle's personal knowledge, of which he testified, of the vital fact of Okuu's marriage, as shown by general reputation. His position in asking the queen whether she claimed the Okuu lands, and upon

learning from her that she did not do so, was in no respect different from that of Leialoha, whom he represented. All that the queen could have inferred from what he said was that he was unwilling to become Leialoha's kahu (guardian) if he was going to be sued for the land. If Leialoha had asked the question and received the same answer she would not have been justified thereby in warranting the title. The queen's words neither have the certainty as to their meaning required of an estoppel in pais, nor were they used with reference to any purpose suggested by the inquiry. By saying, "I make no claim to these lands, no claim whatsoever," she may have meant, "I have no claim," showing her ignorance of her title, and not misleading Mr. Castle who knew of the king's deed from Kahoopuipui. If she meant, "I am now making no claim," this was true; if, "I will make none," it would be a promise without consideration, or an assertion of intention, which could be changed; if she meant, "I have no right in the land," he knew that she had the rights of a devisee of the grantee; if she meant that she regarded herself as bound, or was bound, by the Okuu judgment this would be an admission of a conclusion of law which does not estop; if the object of the interview was to induce her to release her rights, or to agree to abandon them, or not assert them, the obvious course was to ask her to do so, when her answer would have left no room to doubt her meaning.

The plaintiff relied on *Dickerson v. Colegrove*, 100 U. S. 578. The facts in that case were that one Chauncey, who owned the land in controversy, dying in 1853 in Michigan, his daughter, shortly after his death, conveyed the premises, by warranty deed, to one Morton. Three years later Morton learned that there was a son in California and caused a letter to be written to him to learn whether he made any claim to the premises. In response, the son wrote to his sister, "You can tell Mr. Morton for me he need not fear anything from me. Thank God I am well fixed here and you can claim all there. *This letter will be enough for him.* I intended to give you and yours all my property there and more if you need it." Morton thereupon took no measures to perfect his title or procure any redress

from his grantor who had conveyed and been paid for the whole of the property. On the contrary, he thereafter gave deeds of warranty to all of the defendants (62 in number) and he and they occupied and improved the premises until the commencement of this suit,—a period of nearly seventeen years. The court held: "The facts disclosed in the record make a complete case of estoppel in pais." In that case there was no doubt of the purpose of the inquiry or of the land to which it referred. The letter was practically equivalent to a quitclaim of the land.

I have carefully reexamined and reconsidered the decision in order to ascertain whether injustice may have been done, as claimed by the plaintiff, with the result that I am convinced that if a third trial were ordered and a verdict on this evidence obtained for the defendant it could not be sustained.

TERRITORY OF HAWAII v. WONG FEART.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED FEBRUARY 14, 1906. DECIDED FEBRUARY 28, 1906.

FREAR, C.J., HARTWELL AND WILDER, J.J.

STATUTE, TITLE OF—*concurrent jurisdiction.*

The title of "An Act to Authorize Licenses for the Retail of Wines, Beers and Ales of Low Alcoholic Strength" is sufficient to authorize a section providing a penalty for violation of conditions expressed in licenses so authorized and conferring jurisdiction upon "all district magistrates to hear and determine all prosecutions authorized under the provisions of this act." This jurisdiction is not exclusive; circuit courts have jurisdiction of "all criminal offenses, cognizable under the laws of the Territory, committed in their respective circuits." Sec. 1647, R. L.

Id.—*charge of furnishing beer on premises—evidence indicating premises to which license referred—cross-examination, asking witness whether he had been drinking—other offenses—rebuttal.*

The evidence showed that the beer was furnished, as charged, at the defendant's saloon. The refusal of the court to allow the

defendant, in cross-examining a witness, to inquire whether he had "been drinking before that day" in the saloon or at his home or elsewhere, although the questions, when renewed, were said to be asked in order to test the witness' memory; held: not error, there being no suggestion that the defendant proposed to show that the witness was under the influence of liquor.

The defendant having in direct examination testified that liquor had never been sold on Sunday in his saloon, the prosecution was allowed, in rebuttal, to show that the saloon had been known to be open and doing business on preceding Sundays; held: as the defendant claimed that he had not authorized furnishing beer on the Sunday charged, evidence of previous sales on Sundays was material and the evidence in rebuttal was properly admitted.

OPINION OF THE COURT BY HARTWELL, J.

The defendant was convicted upon an indictment which charged that on Sunday, February 28, 1904, when holding a license under Act 61 of the Laws of 1898, entitled "An Act to Authorize Licenses for the Retail of Wines, Beers and Ales of Low Alcoholic Strength," he furnished to one William Ekelä at his place of business, set forth and described in said license, certain spirituous and intoxicating liquor, to wit, beer.

The defendant excepted to the overruling of his demurrer to the indictment, based upon the grounds (1) that the act (meaning the section 8 under which the prosecution is brought) is illegal in embracing more than one subject; (2) that the indictment does not charge an offense within the jurisdiction of the court, or (3) the commission of acts which constitute any offense under the laws of the Territory. It is contended that this is more than an act to authorize licenses: that it is an act to regulate the traffic of intoxicating liquors; that the two things are quite distinct, regulation of the traffic being more extensive than authorizing licenses; that a provision for prosecuting and punishing licensees "is neither necessarily nor reasonably included within the scope and meaning of the title;" that the present law, Act 67, 1905, entitled "An Act to Regulate the Manufacture and Sale," etc., in using the word "regulate," conforms to general usage in titles of acts which provide

for prosecution and punishment of those who violate their provisions. For this contention the following cases are cited: *Lauer v. State*, 22 Ind. 461, holding that "An Act to Regulate and License the Sale of Intoxicating Liquors, and Providing Penalties for the Violation Thereof" did not lawfully embrace a section relating to the jurisdiction of courts and of the practice therein for the prosecution of offenses, on the ground that the section "is not embraced by the title of the act nor properly connected with the subject matter of it;" *Commonwealth v. Frantz*, 135 Pa. 389, that "The Act to Prohibit the Issuing of Licenses to Sell Liquors" in certain boroughs does not lawfully include a section providing a penalty for sale of liquor in the boroughs, since "there is nothing in the title to give notice of such legislation." The rule which has the "greater weight of reason and authority" is that, "When an act of the legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one object, and that shall be expressed in its title." *San Antonio v. Mehaffy*, 96 U. S. 315. When the general purpose is declared in the title, the means for its accomplishment, being a penalty, will presume to be intended as a necessary incident. *Cohn v. People*, 149 Ill. 491. In "An Act to Provide for the Collection of the Special Taxes Imposed by Law on Dealers in Spirituous or Malt Liquors," the indictment for which it provides is only a means to the end for which it was passed. *Brown v. State*, 73 Ga. 38.

In *The King v. Fernandez*, 7 Haw. 505 (1888), this court held that "An Act to Better Prevent Illicit Traffic in Spirituous Liquors" was invalid in providing that the mere possession of liquor beyond a certain small quantity is unlawful. If incongruity between the title "Illicit Traffic" and the subject of possession had been the only thing to consider in that case, the conclusion would not be as obvious as when considered in connection with its making possession of liquor not merely evidence of an intention to sell but an offense per se. "This statute creates a new, distinct offense. The possession of liquor

without selling or intent to sell has hitherto been lawful. The possession without intent to traffic is not related to the offense of illicit traffic." Such an innovation in the penal law ought to be indicated clearly in the title. Acts for granting licenses to sell usually provide penalties for violating the conditions expressed in the licenses. Whether the title "To Regulate Sales" be more usual than "To Authorize Licenses to Sell" or not, the object of licensing sales of spirituous liquor is not merely to obtain revenue, but to regulate the traffic. Nor is the act objectionable in its provision in section 9 conferring jurisdiction "upon all district magistrates to hear and determine all prosecutions authorized under the provisions of this act." Circuit courts have jurisdiction "of all criminal offenses, cognizable under the laws of the Territory, committed within their respective circuits." Sec. 1647, R. L. Neither statute gives exclusive jurisdiction, the language used being common in statutes granting concurrent jurisdiction.

The next exceptions relate to the refusal of the court to strike out the evidence of the witness Ekekela on the ground "that it was not shown by the record that the saloon in which the witness alleged that he had been drinking was the saloon operated by defendant under the license in question."

The prosecution showed, by Sheriff Coney, that the defendant was the holder of a license which was proved and filed, to sell at Kapaa, District of Kawaihau, Island of Kauai, which, among other things, provided that no liquor other than that allowed by its terms should be sold or furnished "in the building or on the premises wherein the said licensee is authorized to sell;" that the sale should be "carried on only in one room fronting on the street on which the saloon is situated." The sheriff testified that he knew the Chinaman who actually operated the business under the license, who was the one who handed out the beer every time he went there to get a glass of beer; that the Chinaman he referred to had just stepped out from the room (obviously meaning the court room).

Ekekela next testified that he knew "the place in Kapaa, known as the Kapaa Saloon" where he went upon the day in

question to buy beer; three other persons, Cummings, Sheldon and Ticktum, having gone in while he was there; that the bartender, with whom the witness was well acquainted, who had charge of selling the beer at that place and whom the witness had seen every day in the saloon behind the counter selling beer, sold him three bottles for one dollar, which the witness and the others drank there; that when the witness went into the saloon two Portuguese were there drinking beer; that he knew the defendant's saloon in Kapaa, which was the place where he had seen the license which was in evidence and shown to the witness.

This evidence shows that the saloon where the witness drank the beer was the one which the defendant used under the license. We do not sustain these exceptions. On the same subject the defendant excepted to the refusal to instruct the jury that the Territory must prove, beyond a reasonable doubt, "that the furnishing of the liquor as charged took place in the room used as the saloon," the court having, in place of that instruction, instructed the jury that "any room under the same roof with the saloon and used in carrying on the saloon business is to be considered as a part of the saloon premises." The defendant argues "that a saloon keeper, away from his business premises, is upon an equality with other citizens as regards the license law," and that if he sold in his own domicil, apart from the saloon, on Sunday, that would not have been a violation of the act or of the terms of the license, but the license expressly provides that no other liquor than that allowed by its terms "shall be permitted in the building or on the premises." The instruction was properly refused.

Exceptions were taken to the refusal of the court to allow the defendant, on cross examination of the witness for the prosecution, Cummings, to ask whether he had "been drinking before that day" in the saloon or at his home with Ekekela, or anywhere else, the defendant's attorney, after several times asking the question, finally saying, in renewing the questions, that he asked them for the purpose of testing the witness' memory. These exceptions are not sustained. We are not willing, in

any but clear cases of abuse of discretion, to reverse rulings of a judge limiting the extent of cross-examination. The defendant did not suggest that he proposed to show that the witness was under the influence of liquor and that the question whether he had been drinking was intended to introduce that inquiry. The refusal of the court to allow the questions does not "show its apparent determination to prevent an inquiry into the witness", Samuel Cummings, condition as to sobriety or drunkenness."

Exceptions 6, 7, 8 and 9, upon this subject, are not sustained. Exceptions 12 to 17 are taken to allowing the prosecution to introduce, in rebuttal, the evidence of one Haupuku, that upon preceding Sundays he had been in the defendant's saloon and known it to be open and doing business. The defendant, on direct examination, in answer to the question, "Has liquor ever been sold on Sunday in that saloon," had testified that it had not, and the rebutting evidence was presented to contradict this testimony. The defendant contends that the question as to previous Sundays was immaterial and that the testimony of the defendant that he had not sold on other Sundays could not be contradicted upon the rule that "a witness cannot be impeached as to immaterial matters, and that evidence in rebuttal of immaterial facts will not be received." The defendant's argument on this point is also directed to his claim that evidence is inadmissible to show other offenses than the one charged in the indictment.

It is claimed by the prosecution that in view of the defense that if beer, if furnished at all, was furnished by a person not authorized to do so and without the defendant's knowledge, evidence of long continued breaches of the law in that respect would tend to show that the furnishing on the day named was within the defendant's knowledge and consent.

The court instructed the jury that if upon all the evidence they were satisfied that the defendant was aware of the sale or furnishing at his place of business on other Sundays, and allowed it to be done, that would tend to prove his consent to the furnishing on the particular Sunday as charged, but if they

believed, upon the evidence, that he did not know of or consent to the furnishing on that day, and that it was done against his express orders, they should acquit. To this instruction the defendant excepted.

It was held in *The Queen v. Leong Man*, 8 Haw. 339 (1892), a charge of selling opium January 22, that evidence was properly admitted that the witness "knew that the defendant's business was that of opium selling, and knew of sales of opium made by him in January." The defendant excepted to the evidence on the ground "that previous sales were not relevant to sustain the charge of selling on the 22d January." The court overruled the exception, regarding the evidence as competent in showing "the previous acquaintance of the witness with the defendant, and to explain why he knew that the defendant had the drug for sale, and went with him to buy it." The evidence was properly introduced in rebuttal to contradict the defendant's testimony on a material point, and therefore we do not sustain the exceptions to its admission, to the refusal to strike it out or to the instruction to the jury above mentioned.

Ten of the exceptions are abandoned. We have sufficiently referred to the substance of the other exceptions, all of which are overruled.

M. F. Prosser, Deputy Attorney General, for the Territory.

C. W. Ashford for the defendant.

IN THE MATTER OF THE EXTENSION OF KUKUI
STREET, CLAIM OF MRS. CHARLES NOTLEY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 10, 1906.

DECIDED MARCH 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EMINENT DOMAIN—statutory proceedings to determine value of land required for public street—right of Territory to discontinue.

The Territory had extended Kukui street under the provisions of Sec. 750, R. L., acquiring, under the provisions of Chap. 52, Ib, the land within the surveyed limits, except the claimant's, on whose claim for damages commissioners, appointed as prescribed by statute, made and delivered to the claimant a decision awarding her \$419.30 damages, from which award and decision she appealed to the circuit court. Upon the case being called for trial the Territory and superintendent of public works filed a discontinuance and abandonment of the proceedings which the court refused to allow, ordering the trial to proceed in their absence with the result of a verdict for the claimant in the sum of \$1250. Held: The Territory had no right to discontinue the proceedings at the time it sought to do so, since it had so far completed the extension that it could not discontinue its public use and, in fact, had not sought to do so, and the claimant's land was required in order to make the extension conform to the statute.

OPINION OF THE COURT BY HARTWELL, J.

The question presented by the exceptions is whether the Territory can discontinue and abandon proceedings to condemn land proposed to be taken for the extension of Kukui street in Honolulu after appraisement by commissioners of the value of the property and appeal by the land owner to the circuit court from the decision of the commissioners awarding her \$419.30 damages.

The claimant refused to consent to the discontinuance and abandonment and demanded that the trial proceed, to which the Territory objected. The court overruled the objection and ordered the trial to proceed at once, to which order the Territory excepted and thereupon withdrew from participation in the trial. The court thereafter empaneled a jury and proceeded with the trial in the absence of any one representing the Territory, the result of the trial being a verdict for the claimant in the sum of \$1250.

Chapter 56 of the Revised Laws, relating to extension of certain streets in Honolulu including Kukui street, provides (Sec. 746) that the streets "shall be extended as in this chapter set forth, at such times as the governor shall decide, according to the respective surveys for such extension thereof in section 750, anything in chapter 52 to the contrary notwithstanding. And whenever the governor shall deem it desirable for the public convenience so to extend the said streets or any of them, as aforesaid, he may cause the same to be done, after requiring the damages and betterments which such extension or extensions will cause in private real estate affected thereby to be appraised according to the provisions of said chapter."

The claimant contends that she is entitled to compensation for her land as the statute provides that its title vested in the Territory upon delivery to her of the commissioners' decision (Sec. 700, R. L.), and that the Territory cannot be heard to claim, as it does, that the statute is unconstitutional; also that the Territory had no right to discontinue proceedings and that if this could be done, under any circumstances, consent of the court would be required upon a showing of good or equitable reasons.

The Territory claims the absolute right to discontinue on the ground that it is essential to ascertain the cost of the entire improvement before being bound to make it and that there is no liability incurred to pay for the land until it is actually taken.

It is difficult to say what additional meaning is given by the second paragraph of section 746 since by the first paragraph

the governor has discretion to decide when any of the streets shall be extended, and the general statute concerning public improvements (Chap. 52) prescribes the method of acquiring land and ascertaining its value. The governor can defer his decision as to the extension of any street until after learning what that expense would be and to do this would be in the public interest. The phraseology of the section is used in the acts providing for Hilo street extension (Chap. 58, R. L.) and for widening certain Honolulu streets (Chap. 55, Ib.). Under either paragraph of section 746 it is discretionary with the governor whether to have any of the streets extended or not and at what time any shall be extended if it is to be done at all. If it rested with him alone to say, it is proper to infer that he would not decide to have a street extended at any time unless he considered it "desirable for the public convenience." The latter part of the second paragraph of section 746 may be regarded, on the one hand, as expressing a condition precedent to the governor causing a street to be extended, and as requiring him first to obtain an appraisement of the damage resulting to private real estate, or, on the other hand, as expressing the statutory proceeding which regularly precedes the construction of any public highway. If we construe the statute as limiting his authority to cause a street to be extended by his performance of this condition precedent, namely, ascertaining the entire cost, then it would follow that Kukui street has not been lawfully extended since the value of the claimant's land was not ascertained. This conclusion is obvious since the statute requires the streets to be extended, if at all, "according to the respective surveys for such extension thereof in section 750." Section 750 is a schedule of the surveys, in each of which the proposed extension is specified to be "fifty feet in width." Under this provision no street of less width could lawfully be extended.

Upon consideration of all the difficulties of construing this provision for ascertaining damages as a condition precedent to causing a street to be extended we are of the opinion that nothing more is intended than to express the method prescribed by statute in all such cases. In this construction the clause may

appear superfluous, but it may have been regarded as important in order to make the act complete in itself.

While the extension of Kukui street might have been deferred until an appraisement was made of the value of all the land to be used for it, and need not have been begun if the cost had appeared to the governor to be excessive, yet it was decided upon and so far constructed that it cannot be discontinued. The superintendent, after failure to agree with this claimant concerning the value of her land, having caused commissioners to be appointed to decide its value, she has a right to have the value determined in the manner provided by statute. He has no authority to discontinue the new street, which is constructed, nor to leave out the claimant's land which is required in order to make the extension conform to the statute.

Confining the ruling strictly to the facts in this case we hold that the Territory had no right to discontinue these proceedings at the time it sought to do so since the extension of Kukui street had so far been completed that the Territory could not discontinue its public use and, in fact, had not sought to do so.

This was not a common law action which the Territory, regarded as a plaintiff, could discontinue or nol' pros at will at any time before going to the jury. *Wright v. Bartlett*, 49 N. H. 290; *Hughes v. Moore*, 11 U. S. 189; *Commissioners v. Trustees*, 107 Ill. 489.

In the view which we have taken of the case it is unnecessary to consider the constitutionality of the statute vesting the title in the Territory upon delivery to the claimant of the decision of the commissioners, nor the right of the Territory to raise the question.

Exceptions overruled.

M. F. Prosser, Deputy Attorney General, for the Territory.

S. H. Derby, Kinney, McClanahan & Cooper on the brief, for the claimant.

CONCURRING OPINION OF FREAR, C.J.

I concur on the ground that whether the Territory could have discontinued the street extension or not, it did not do so, and so long as it did not do so it could not discontinue the proceedings for ascertaining the value of the particular land in question.

SEATTLE BREWING & MALTING CO. *v.* A. J. CAMPBELL, TREASURER OF THE TERRITORY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 12, 13, 1906. DECIDED MARCH 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ACTION AGAINST TREASURER—*for money illegally exacted and paid under protest.*

An action may be maintained against the treasurer of the Territory in his private capacity to recover money illegally exacted by him under color of his office and paid under duress and protest and with notice that action would be brought against him for the money. In such case, in the absence of statute to the contrary, he may retain the money to await the result of the action, and if he pays it into the treasury he does so at his peril. The provision of the audit law which requires public accountants to pay weekly into the treasury moneys collected by them does not require the treasurer to pay into the treasury without awaiting the result of litigation moneys collected by him under the circumstances mentioned.

INVOLUNTARY PAYMENT—*what is sufficient to constitute.*

Payment of a license fee by a foreign corporation is made under duress within the law of involuntary payments when it is made under protest upon the demand of the appropriate public officer under a statute which denies a delinquent corporation the benefit of the laws of the Territory.

OPINION OF THE COURT BY FREAR, C.J.

This case comes here by special leave of the circuit judge on exceptions to an interlocutory order overruling a demurrer. The action is assumpsit to recover back \$500 license fees for the two years beginning July 1, 1903 and 1904, respectively, and \$250 penalty for previous nonpayment of the license fees, which sums were paid under protest by the plaintiff to the defendant on March 25, 1905, upon the latter's demand for immediate payment thereof, under Section 2625 of the Revised Laws. That section, which has since been slightly amended (by Act 98, 1905), provides that no foreign corporation, except foreign insurance companies, which does not invest and use its capital in the Territory, shall have an office in the Territory unless it shall first have obtained from the treasurer an annual license to do so, for which license it shall pay into the treasury one-fourth of a mill on each dollar of its capital stock which it is authorized to have, but not less than \$150 in any case. The treasurer is authorized to collect the amount of the fee, with a penalty of 50 per centum for failure to pay the same, but there is a proviso that no license shall be necessary for any corporation engaged in the business of foreign or interstate commerce or while employed by the government of the United States. The plaintiff alleges that it is a foreign corporation organized under the laws of West Virginia and that during the period in question it invested and used its capital in this Territory and was engaged in the business of foreign and interstate commerce; also that it made the payment under protest in writing, contending that it was not liable because it was not one of the foreign corporations to which the statute was applicable and was engaged in the business of foreign and interstate commerce; and that at the same time it notified the defendant that it would institute suit to recover the money so paid under protest. In support of the demurrer it is contended (1) that the action, if it lies at all, should be brought against the Territory and not against the treasurer, and (2) that in any event no recovery can be had because the payment was voluntary and not under duress.

The action is based on the theory of an implied promise to pay back moneys illegally demanded and paid under compulsion. There can be no recovery if the demand was legal though the payment was compulsory, nor if the payment was voluntary though the demand was illegal. The fact that the payment was made under protest would not alone authorize a recovery. The object of the protest was to save the rights, if any, arising out of the illegality of the demand and the compulsory nature of the payment, by showing that the legality of the demand was not admitted. *Railroad Company v. Commissioners*, 98 U. S. 541, 544. We must assume on demurrer that, as shown by the complaint, the plaintiff was not within the statute and that therefore the demand was illegal. Assuming also for the present that the payment was involuntary, the first question is whether, if there was an obligation to refund, it rested on the defendant or the Territory.

If the defendant had paid the money into the Territorial treasury and was justified in doing so and the action were against him in his official capacity for the purpose of reaching such money in the treasury, it would be a mere ruse for an action against the Territory, and, if it would lie at all against him nominally, in order to reach the Territory really, it would have to be brought in the supreme court like other actions brought against the Territory by its consent, and payment of the judgment if the action were sustained would have to await an appropriation by the legislature. *Smith v. Reeves*, 178 U. S. 436; *Flagg v. Bradford*, 181 Mass. 315. The present action is sustainable, if at all, only as an action against the defendant in his personal or private capacity, based on the theory that the collection made by him was without authority of law and that therefore not only was he under no obligation to pay the money over to the Territory as against the plaintiff, to whom it rightfully belonged, but, being warned that the legality of the demand was denied and that the suit would be brought for the recovery of the money, he was in duty bound to refund it, and if he paid it over to the Territory after such warning he did so at his peril. There is no doubt that ordinarily a common law action for

money had and received, founded upon a promise implied from the duty to refund what is illegally exacted, lies against an officer in his individual capacity under such circumstances. A leading case is *Elliott v. Swartwout*, 10 Pet. 137, in which it was held that customs duties illegally exacted might be recovered in such an action from the collector of customs. This court, following that case, held the same way in *Castle v. Luce*, 4 Haw. 63, which was an action against a tax collector to recover taxes illegally exacted. Numerous similar actions have since been entertained without question. *Hackfeld v. Luce*, 4 Haw. 172; *Turton v. Kapena*, 5 Haw. 278; *Castle v. Luce*, 5 Haw. 321; *Wailuku Sugar Co. v. Aholo*, 6 Haw. 267; *Alexander v. Fornander*, 6 Haw. 322; *McBryde v. Kala*, 6 Haw. 529; *Haiku Sugar Co. v. Fornander*, 6 Haw. 532; *Brewer v. Luce*, 6 Haw. 554; *Union Feed Co. v. Luce*, 7 Haw. 64; *Bishop v. Gulick*, 7 Haw. 627; *Hilo Sugar Co. v. Minister of Finance*, 7 Haw. 665; *Knudsen v. Stoltz*, 8 Haw. 81; *Hilo Sugar Co. v. Tucker*, 8 Haw. 148; *Skinner v. Gulick*, 8 Haw. 189; *Parker v. Shaw*, 9 Haw. 407; *Robertson v. Pratt*, 13 Haw. 590.

But if the treasurer were required by statute to pay the money over to the Territory immediately and without awaiting the result of litigation notwithstanding the plaintiff's protest, equity and good conscience, which is at the foundation of an action for money had and received, would not require him to refund, for that would be to require him to pay twice through no fault of his own. If the statute required him to pay to the Territory the common law would not require him to pay to the plaintiff,—in which case the action would lie, if at all, against the Territory and not against the defendant. *Cary v. Curtis*, 3 How. 236,—in which it was held that moneys illegally exacted for customs duties could not be recovered in an action against the collector in view of a statute, enacted after the decision in *Elliott v. Swartwout*, supra, which provided that moneys paid for unascertained duties or for duties paid under protest against the rate or amount of duties charged should be disposed of as other moneys paid for duties and not held by the collector to await the ascertainment of duties or the result of any litigation

in relation to the rate or amount of duty. That case was followed in *Mallan v. Bransford*, 86 Va. 676 (10 S. E. 978), under a statute which showed clearly that the collector of taxes was to pay them over immediately into the treasury and not await the result of litigation. It was followed also by this court in *Peacock v. Castle*, 11 Haw. 10, under a statute relating to customs duties which was copied from the Federal statute, the court relying in part upon the principle that when one state adopts a statute of another it adopts also the construction put upon it by the courts of the other.

The defendant contends that there are statutes applicable to the present case, similar in effect to those above mentioned, which make it the duty of the treasurer, as a public accountant under the audit law, to pay all moneys collected by him as treasurer into the treasury and not retain moneys paid under protest to await the result of litigation in regard to them. Section 1515 of the Revised Laws provides that "All persons who, by any law, regulation or appointment are charged with the duty of collecting or receiving revenue or other moneys on account of the Territory, or with the duty of disbursing moneys on account of the public service shall become and be 'public accountants,' and shall perform all such duties and render such accounts as this chapter prescribes, and as the treasurer and auditor shall from time to time direct." Section 1520 provides that "Every such public accountant collecting or receiving revenue or other moneys aforesaid in Honolulu shall pay weekly, or at such times as may be otherwise specially appointed, into the treasury all sums of money collected or received by him on account of the revenue or otherwise as aforesaid, accompanied by vouchers bearing his signature, and which such sums shall have been collected or received, and unless otherwise specially directed, shall not later than the tenth day after the expiration of each month, transmit to the auditor a return in the form contained in section 1545, with such particulars in each case as may be required by the auditor, of all moneys collected or received by him during the preceding month, and shall make and subscribe to an oath in the form

prescribed in such section." Section 1526 provides that moneys shall not be drawn out of the treasury, except in certain cases of which this is not one, except upon warrants signed by the auditor or his deputy. Section 2966 provides that "If any officer or other person who, by law, regulation or appointment now is or hereafter shall be charged with the safe keeping, transfer or disbursement of any money, note or other effects or property belonging to the Territory of Hawaii, shall convert the same to his own use or benefit, or to the use and benefit of another than the owner or person entitled thereto; or shall loan, with or without interest, or shall deposit in his own name, or otherwise than in the name of the Territory of Hawaii, in banks or with any person or persons, or change for other funds or property, any money or moneys intrusted to his safe keeping, transfer or disbursement, except in the manner prescribed by law, regulation or appointment, he shall be deemed guilty of embezzlement," etc.

Assuming that the treasurer is a public accountant within the meaning of sections 1515 and 1520, notwithstanding that the former section permits him with the auditor to prescribe rules for public accountants and that the latter section would in such case require him to deal with himself, and assuming that these sections should be construed as covering collections under color of any law, regulation or appointment as well as under the authority of any law, regulation or appointment (see *De Lima v. Bidwell*, 182 U. S. 180), we are nevertheless of the opinion that these sections do not go to the extent contended. They do not, like the statutes in the *Cary*, *Mallan* and *Peacock* cases, contain express provisions requiring the payment of moneys into the treasury without awaiting the result of litigation. There would be an equal duty to pay such moneys into the treasury sooner or later even in the absence of a statute prescribing the times at which they should be paid. The provisions of sections 1515 and 1520 have been in force during the period in which nearly all of the Hawaiian cases above cited were decided, and yet it has never been suggested that they prevented actions of this kind. They were sections 1 and 2 of chapter 23 of the Laws of 1882 and sections 29 and 30 of

chapter 39 of the Laws of 1898. When the *Elliott* case was decided a statute had been in force thirty-seven years which required collectors "at all times to pay to the order of the proper officer the whole of the moneys which they may respectively receive," and that they should "once in three months or oftener if required, transmit their accounts," and the secretary of the treasury required the collector of New York, who was the defendant in that case, to pay over moneys received by him weekly or at short intervals, and yet, although this statute was called to the attention of the court by counsel (see page 146), it was not deemed sufficient to abrogate the common law remedy. Even the explicit statute in the *Cary* case was thought not to go to that extent by Justices Story and McLean, who supported their views in vigorous dissenting opinions, the latter laying considerable stress, among other things, upon the fact that the *Elliott* case was decided as it was notwithstanding the earlier statute just referred to; and congress, immediately after the decision in the *Cary* case, altered the law so as to permit suits against the collector notwithstanding his obligation to pay the money over to his superior, but such suits were thereafter regarded not as common law suits but as statutory suits or at least as suits based on statutory liability in the nature of actions against the government permitted to be brought against the collector as matter of favor. See *Peacock v. Castle*, supra. In *Philadelphia v. Collector*, 5 Wall. 720, it was contended that certain provisions in the internal revenue laws had an effect similar to that of the statute referred to in the *Cary* case. One of these provisions required collectors to pay daily into the treasury the gross amount of all collections under the internal revenue acts without any abatement or deduction on account of claims of any description whatever, but the court did not find it necessary to say what the effect of those provisions would be on the common law remedy, because, in the opinion of the court, it was clear that they were not sufficient to repeal by implication other provisions from which it appeared that congress intended that suits might be brought against collectors, such suits being similar to those allowed by congress under the cus-

from laws after the *Cary* decision, that is, statutory suits, not common law suits. See *Collector v. Hubbard*, 12 Wall. 1, 13. Perhaps, even if the provisions of our statutes referred to above were sufficient to preclude the common law remedy under ordinary circumstances, it should not be held to have that effect in a case like the present in which the statute, under which the license fees purport to have been exacted, by its very terms had no application to the plaintiff if the allegations of the complaint are true, as we must presume they are for present purposes. See *De Lima v. Bidwell*, 182 U. S. 179.

The case of the treasurer is not different in principle from that of other officers, such as collectors of taxes or customs duties, although his connection with the treasury is closer. The theory of the case is that he acted without authority of law and therefore in his private capacity, in which case he as well as any other officer could retain moneys illegally exacted and paid involuntarily and under protest to await the result of litigation. In *Scottish U. & N. Ins. Co. v. Herriott*, 109 Ia. 606, the statute provided that foreign insurance companies should pay certain taxes "into the state treasury" as a condition of their doing business within the state. A British company paid the taxes to the state treasurer under protest upon the demand of the state auditor. It was held that an action would lie against the treasurer for the recovery of the amount so paid if the law was invalid. In *Ratterman v. Express Co.*, 49 Oh. St. 609, an action was sustained against a county treasurer to recover back moneys paid under protest by an express company under a statute which required express companies to pay certain taxes on their gross receipts from interstate business. See also *Osborn v. U. S. Bank*, 9 Wheat. 738, 837, 843, 845.

There are, no doubt, strong reasons why in point of policy officers should not be allowed to retain moneys collected under color of their offices to await the result of litigation, but, on the other hand, it would be a hardship to require persons who paid such moneys under duress and protest to await action by the legislature in order to recover them after judgment in an action against the Territory as now provided. A wise middle

course would seem to be to provide, as is done by some federal and state statutes, that moneys collected should be paid into the treasury without awaiting the result of litigation, but that if adjudged to have been illegally exacted they might be paid back without waiting for a special appropriation.

The next question is whether the payment in this case was involuntary. As already stated the mere fact that the money was paid under protest would not authorize a recovery; nor would the mere fact that it was paid unwillingly or reluctantly. It is essential that it should have been paid under compulsion or duress within the meaning of the law of involuntary payments. Perhaps the same degree of duress would not be required as would be required for the purpose of setting aside a conveyance, the execution of which was alleged to have been procured by duress. Probably also forms of compulsion would be considered sufficient under present conditions of commercial activity which would not have been considered sufficient at some earlier periods. Actual or threatened seizure or detention of person or property is not indispensable to constitute duress under all circumstances. In the present case liability to the pecuniary penalty would not alone be sufficient, for even if under other circumstances it would be sufficient, as held by some courts and not by others, it had in the present instance already been incurred when demand for the license fee and the penalty for previous nonpayment was made. Nor is the fact sufficient that nonpayment is made a misdemeanor on the part of the corporation, for, even if making the corporation itself subject to prosecution for a misdemeanor and payment of a pecuniary penalty on conviction would be sufficient, the statute in question provided no penalty whatever and thus rendered the provision nugatory. It has since been amended so as to provide for a fine upon conviction of the corporation and also so as to make the agents of a delinquent corporation guilty of a misdemeanor and subject to fine or imprisonment or both. Act 98, 1905. The statute, however, provides that a delinquent corporation shall not have an office in the Territory for the use of its officers, agents, stockholders or employees, though it imposes no special penalty for having such an office without payment of a

license fee, but it is specifically provided that "every foreign corporation failing to comply with any of the statutes regarding foreign corporations * * * shall be denied the benefit of the laws of the Territory, particularly the statute limiting the time for commencement of civil actions or of criminal actions, and shall not be entitled to sue, plead or appear, except as herein below provided, in any court of this Territory for any cause of action whatever, while such neglect or refusal continues; provided, however, that the court may grant, in its discretion, additional time within which to comply with the statutes, when it shall appear that said corporation has a meritorious defense to any action brought against it." R. L., Sec. 2626. The effect of this provision is similar to that of provisions elsewhere which forbid the transaction of business within the state by foreign corporations which fail to pay their taxes or license fees and which have been held sufficient to constitute duress. See the Iowa and Ohio cases above cited. In *Robertson v. Frank Brothers Co.*, 132 U. S. 17, the court, in referring to an earlier case, said:

"In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each."

See also 2 Page, Contr., Sec. 798 et seq.; 22 Am. & Eng. Enc. of Law, 2nd Ed., 612 et seq.; 27 Id. 757 et seq. In our opinion the payment in question should be regarded as involuntary.

The exceptions are overruled.

A. G. M. Robertson for plaintiff.

M. F. Prosser, Deputy Attorney General, for defendant,
E. C. Peters, Attorney General, on the brief.

TERRITORY OF HAWAII, BY C. S. HOLLOWAY,
SUPERINTENDENT OF PUBLIC WORKS, v. E. J.
COTTON, C. E. COTTON AND JAMES B. AGASSIZ,
PARTNERS UNDER THE NAME OF COTTON
BROS. & CO.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 27, 1906.

DECIDED MARCH 8, 1906.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF HARTWELL, J.

ORDER FOR NEW TRIAL—*when and when not interlocutory for purposes of writ of error.*

An order granting a new trial is usually interlocutory and not reviewable on error, whatever may be the rule on exceptions, until after the new trial has been had and final judgment entered; but if there was no jurisdiction to make the order, it is final in its nature and may be brought up immediately on error.

BOND ON NEW TRIAL—*must be filed within 10 days after verdict, though judgment not entered.*

Under R. L., Sec. 1865, on a motion for a new trial, the bond for costs and against disposition of property to plaintiff's detriment, as well as the motion itself, should be filed within ten days after verdict, whether judgment has been entered or not.

Id.—*may be waived, how.*

The filing of such bond within the time prescribed by the statute may be waived, either expressly or by implication, but the mere fact that plaintiff's counsel did not raise the objection that no bond had been filed on the seventh day after verdict when defendants' counsel intended to present the motion according to notice given by him, but instead sent word to the court that he was not ready, and desired a postponement, being then otherwise engaged, would not constitute a waiver or prevent his raising the objection

on the eleventh day after verdict, which was the day to which the postponement was made on the seventh.

OPINION OF THE COURT BY FREAR, C.J.

On May 27, 1904, at the April term of the circuit court of the first circuit, the plaintiff obtained a verdict for \$25,000 damages for the loss of its dredger through the alleged negligence of the defendants. On May 31 the defendants moved for a new trial and gave notice that the motion would be presented for argument on June 3 or as soon thereafter as counsel could be heard. Accrued costs were paid and a deposit made for the costs of the motion, but no bond was filed conditioned for the payment of the costs of the motion and that the defendants would not to the detriment of the plaintiff remove or otherwise dispose of any property they might have liable to execution on the judgment, as required by Sec. 1805 of the Revised Laws. On the day noticed for the presentation of the motion, June 3, defendants' counsel appeared but plaintiff's counsel sent word to the court that he was not ready, being otherwise engaged, whereupon a postponement was ordered at his request until June 7, when he moved that defendants' motion be dismissed for failure to file a bond as above mentioned, having given no intimation previously of his intention to so move. The facts as to what plaintiff's counsel did on June 3 appear only by an affidavit made by defendants' counsel and filed in the circuit court on June 7 in support of a motion that "time for perfecting motion for new trial by filing bond as required by statute be extended forty-eight hours from date." The affidavit and motion were made and filed after argument had been made on the same day by counsel on both sides upon plaintiff's motion to dismiss the motion for a new trial because of failure to file the bond required, and after defendants' counsel had asked orally for twenty-four hours in which to file the bond after entry of judgment, no formal judgment having been entered previously. The court, Judge Gear sitting, had taken the question of dismissing the motion for a new trial under advisement until 1:30 p. m., but at 12 m., upon defendants' counsel pre-

senting the motion and affidavit above referred to, ordered the clerk to enter judgment and held that the bond required by the statute could not be filed until the judgment was entered, and therefore granted defendants' motion for two days' time in which to file the bond, to which ruling plaintiff excepted. It seems that two formal judgments were entered, one on June 7, "as of April term, 1904," by one clerk; the other on June 8 "as of the 27th day of May, 1904," by another clerk. The bond was presented and approved June 7 and filed the next day, and on June 7 defendants' counsel gave notice that the motion for a new trial filed May 31 would be presented for argument on June 14 or as soon thereafter as counsel could be heard. The matter was continued on the 14th to the 17th, when the plaintiff renewed its objection to the hearing of the motion for a new trial on the ground that the movant had not complied with the statutory requirements. The objection was overruled and argument was heard on the motion for a new trial. Before deciding the motion Judge Gear went to California, but defendants contend that his absence from the Territory does not appear from the record and cannot be noticed judicially.

On February 27, 1905, the clerk received and filed a cablegram dated San Francisco, Cal., February 27, 1905, as follows: "In Territory v. Cotton order motion for new trial granted. Grounds mailed. Gear, judge." On March 4, 1905, the clerk received by mail and filed an opinion ordering a new trial signed by "Gear, judge;" also a letter dated San Francisco, Cal., Feb. 25th, 1905, from "Geo. D. Gear," stating that he had been kept "here" by sickness and that he sent 2 memoranda for the clerk to file and hoped they would get "there" in time, one of the memoranda apparently being the opinion just mentioned. Judge Gear's term of office was for four years from March 2, 1901, and therefore expired at midnight March 2, 1905, if not at midnight the preceding day. On April 14, 1905, defendants moved the court, Judge Lindsay, who was Judge Gear's successor, sitting, that a formal order be entered granting a new trial, which motion was granted July 17, 1905, the formal order being entered the next day, to which the

plaintiff excepted. On January 17, 1906, the plaintiff sued out this writ of error to reverse the order of Judge Lindsay granting a new trial. The defendants now move to quash or dismiss the writ, mainly on the ground that a writ of error does not lie to an order granting a new trial, contending that such an order is not a final judgment, but an interlocutory ruling only. The question is whether the writ should be quashed or dismissed on this ground.

Some courts hold that a ruling on a motion for a new trial, whether granting or refusing a new trial, is discretionary with the trial judge and cannot be reviewed by the appellate court on appeal, error or exceptions, whether before or after a new trial has been had, if one has been ordered, unless at least the ruling was based on matters occurring or discovered after the first trial and in regard to which therefore no exceptions could have been taken before verdict or judgment. Other courts, while holding that such a ruling is not so far discretionary as to preclude review within certain limits, hold nevertheless that it is interlocutory and cannot be reviewed before a new trial has been had, if one has been ordered, and, indeed, cannot ordinarily be made the direct subject of appeal, error or exceptions, but can be reviewed only upon a review of the final judgment in the case. See, in general, *Wheeler v. U. S.*, 159 U. S. 523; *Baker v. White*, 92 U. S. 176; *Waterhouse v. Rock I. A. M. Co.*, 97 Fed. 466; *Young v. Shallenberger*, 53 Oh. St. 291; *People v. Judge*, 41 Mich. 5; *Williams v. La Valle*, 64 Ill. 110; *Magill v. Lyman*, 6 Conn. 59; *Johnson v. Parrotte*, 46 Neb. 51; *White v. Pease*, 15 Utah 170; *Commonwealth v. Morrison*, 134 Mass. 189; *Samuel v. Judin*, 6 East 333.

It is contended by the defendants that in this jurisdiction an order granting a new trial, whatever may be the rule with respect to an order refusing a new trial (see *Harrison v. Magoon*, 16 Haw. 170, 332), is interlocutory, and, on the analogy of decisions in cases brought up on exceptions to other interlocutory rulings, cannot be reviewed on error before final judgment in the case. The interlocutory rulings referred to, which it has been held cannot be reviewed on exceptions before final

judgment, were orders overruling demurrers, pleas of former conviction and the like. See *Barthrop v. Kona Coffee Co.*, 10 Haw. 398, and cases there cited; also *Territory v. Ah Quong*, 14 Haw. 108. It has not been held that an order granting a new trial cannot be brought up immediately on exceptions, although in *Ahmi v. Cornwell*, 14 Haw. 301, where such a contention was made on the ground that the order was interlocutory, the court based its opinion, that the exception could be entertained, upon the ground, not that the order granting a new trial was not interlocutory or that if it was it could be reviewed immediately, but that the exceptions had been certified up by the trial court under an express statutory provision permitting it in its discretion to certify exceptions to interlocutory rulings. In other cases, however, in which objection was made to entertaining exceptions to orders refusing new trials, based on the ground that such orders were discretionary, the court has expressly stated that, whatever might be the rule elsewhere, in this jurisdiction an order either denying or granting a motion for a new trial may be brought up on exceptions. See *George v. Holt*, 9 Haw. 135; *Republic v. Iapa*, 9 Haw. 622. (See also *Ah Chu v. Sung Kwong Wo Co.*, 5 Haw. 291). It is true that in these cases the court did not expressly say when the order or ruling might be brought up, that is, whether before or after final judgment, but there can be no doubt that it meant immediately; it of course meant that a ruling on a motion for a new trial could be made the direct and independent subject of a bill of exceptions; not merely that it could be considered on a review of the final judgment itself. These decisions were made about the same time as most of the decisions above referred to which held that other interlocutory rulings could not be brought up immediately on exceptions and the second of these decisions was made after most of those cases were decided. The statement made in some of those cases, to the effect that the fact that exceptions to such other interlocutory rulings had been entertained in some cases did not establish the right to bring such exceptions immediately, because the practice had generally been the other way and because when such exceptions had been

entertained it was by consent or because the point was not noticed, does not apply to rulings on motions for new trials; for, as stated in *George v. Holt*, the practice had been different in respect to exceptions to such rulings. Instances of entertaining exceptions to orders granting new trials may be found in the same volume of the reports. See *Kaanaana v. Keahi*, 9 Haw. 318; *Macfarlane v. Lowell*, 9 Haw. 438. Of course in such cases where the ruling of the trial judge is not on a pure question of law considerable weight is given to his opinion, particularly if he grants a new trial. The rule of the court, which, as often stated in the decisions, was based on the statute in regard to motions for new trials, also shows unmistakably that it was regarded as correct practice to bring an order granting or refusing a new trial directly to this court on exceptions. Rule VIII, 5 Haw. iii. See also Rule 15 of the circuit courts, 9 Haw. 718, adopted soon after the reorganization of the judiciary department.

In view of the foregoing we prefer not to pass upon the question whether an order granting a new trial may or may not be brought to this court immediately on exceptions, and it is unnecessary to do so, for, assuming that it cannot, it does not follow that it can be brought here immediately by writ of error. The practice in regard to exceptions has been different from that in regard to error. The statute in regard to exceptions is broader than that in regard to error. Exceptions and error are inherently proceedings of different character. On exceptions, various specific rulings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review; only so much of the record is brought up as is necessary for passing upon the specific exceptions; the decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment; the entire record is brought up, and the judgment of the appellate court is such

as the facts and law warrant as shown by the entire case. Orders granting new trials are no doubt of an interlocutory nature and error in general lies only to review a final judgment, and we accordingly hold that ordinarily an order granting a new trial cannot be brought up immediately by writ of error. Perhaps this view is supported to some extent by analogy by the cases of *Est. of Banning*, 9 Haw. 357, and *Lyman v. Winter*, 15 Haw. 424, which were cases of appeals from a circuit judge sitting in probate and from a district magistrate respectively.

If, however, as contended by the plaintiff, the circuit court had no power to make the order granting a new trial when it was made, it was a final judgment. In such case the court, having no jurisdiction over the verdict already obtained, could not vacate it or set it aside for the purpose of a new trial upon the merits of the original action. The motion for a new trial would in such case have to be regarded as a new proceeding and the order granting a new trial would be the final order in that proceeding and therefore reviewable. *Hume v. Bowie*, 148 U. S. 245; *Macfarland v. Brown*, 187 U. S. 244; *Deering v. Creighton*, 26 Or. 556. The question, therefore, is whether the circuit court had jurisdiction of the motion for a new trial and power to grant the motion.

The defendants' failure to file the required bond within the ten days prescribed by the statute was fatal unless it was waived by the plaintiff. The defendants contend strenuously that since the bond is required by the statute to be conditioned that the defendant will not, to the detriment of the plaintiff, dispose of any property he may have liable to execution on "such judgment," it could not be filed and therefore was not required to be filed before the entry of judgment, which in this case, as shown above, occurred the eleventh day after the verdict, and that therefore the bond, which was filed on the day of entry of judgment, was filed in sufficient time. Of course the judge could not extend the time prescribed by the statute. See *Kapiolani Est. v. Peck*, 14 Haw. 580; *Kapiolani Est. v. Thurston*, 16 Haw. 147. The question is solely, what did the statute require? This provided, Revised Laws, Sec. 1805, since

amended, that "any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security, conditioned," etc., "and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after rendition of verdict or judgment, for a new trial, for any cause for which by law a new trial may and ought to be granted." The preceding section, since amended, provided that "judgment shall be entered by the clerk, without motion, immediately upon the rendition of a verdict, or of a judgment of the court, or of a judge at chambers, and execution may issue thereon at any time thereafter, when called for, unless notice is given at the time of rendering the verdict, or judgment, of a motion for a new trial and the filing of a bill of exceptions and bond, as provided by statute, within ten days after the rendition of such verdict or judgment." There are several possible constructions of the words "such judgment" in section 1805. For instance, these words may have been used in a broad sense to denote a verdict as well as a judgment, for the words "verdict or judgment" previously used in this section are used "as set forth in the last preceding section," in which the word "judgment" is used not in the sense of a judgment entered on a verdict but in the sense of a judgment by the court in the nature of a verdict, as in a jury waived case, and in both sections the verdict and judgment are expressed to be those rendered, not those entered. Or, if such words are not used in that sense, but in the sense of a judgment rendered as distinguished from entered upon a verdict, they may refer to the judgment rendered in contemplation of law, which is the only judgment that is usually rendered on a verdict in a civil case in this Territory, for seldom if ever does the court formally render a judgment upon a verdict in this jurisdiction. Again, if these words refer to the judgment entered as distinguished from the judgment rendered, they may mean the judgment entered in contemplation of law, that is, as required by section 1804, and perhaps presumed in law to have been entered whether entered in fact or not. See *Rose v. Smith*, 5 Haw. 377, 380. As matter of fact the judg-

ment in this case was entered nunc pro tunc. Or, these words might refer to such judgment as may be entered. We believe that usually judgment is not entered pending a motion for a new trial, and that in such cases the bond is usually or often conditioned against the disposal of property liable to execution on such judgment as may be entered upon the verdict. Whatever the true construction, it is obvious that construing the section as a whole and in connection with the preceding section, the motion must be presented within ten days after verdict and the bond must be filed at least within the same time, for the motion cannot be made except upon filing the bond and there was certainly no intention that a motion for a new trial could be made or perfected by filing a bond and paying costs at any time after formal entry of judgment however long that might be after verdict. Even if judgment had to be entered before the bond could be filed, it would be the duty of the movant to see that it was entered within the ten days or forfeit his right to move for a new trial. That the bond must be filed within ten days after verdict is established by former practice and decisions. See *Joliva v. Kaulukou*, 7 Haw. 731; *Gonsalves v. Brito*, 8 Haw. 254; *Ferreira v. Honolulu R. T. & L. Co.*, 16 Haw. 797; see also *Briggs v. Mills*, 4 Haw. 450; *Napahoa v. Chinese Union*, 7 Haw. 379. This is also the construction placed upon the statute by the rules of court above referred to. Indeed, the question has not been whether judgment had to be entered before the bond was filed or whether the motion could be made or bond filed after entry of judgment, even though more than ten days after verdict, but whether judgment could properly be entered at all after the filing of the motion and before its disposition, or whether if entered immediately after verdict but before the filing of a motion for a new trial it was not vacated by the filing of the motion. See *Herblay v. Norris*, 9 Haw. 121; *Byrne v. Allen*, 10 Haw. 327; *Kukea v. Keahi*, 10 Haw. 505.

The question then is whether the failure to file a bond within the required time could be waived and if so whether it was waived. Many courts hold that although formal or technical

defects in bonds of this nature may be waived, substantial defects, such as the want of a surety on the bond and, a fortiori, the failure to file any bond within the required time, cannot be waived either by implication, as by entering a general appearance or joining in error or submission on the merits, or by an express waiver, whether oral or in writing,—the argument being that the requirement of a bond is not wholly for the benefit of the adverse party but partly for the purpose of discouraging frivolous and vexatious litigation as a matter of public policy, and that jurisdiction being conditioned upon compliance with the statutory requirements cannot be conferred by consent. *Ten Brook v. Maxwell*, 5 Ind. App. 353; *Lyell v. Guadeloupe*, 28 Tex. 57; *Santom v. Ballard*, 133 Mass. 465; *Henderson v. Benson*, 141 Mass. 218; *Marx v. Lewis*, 24 Nev. 306 (53 Pac. 600); *Cape Fear, etc., Co. v. Coston*, 63 N. C. 264. Probably, however, no court would hold that the objection of the want of a bond would be good if made for the first time after decision of the motion for a new trial or appeal as the case might be. In this jurisdiction, it was held in *Paakuku v. Komoikehuhu*, 3 Haw. 642, that appellee's counsel could not by stipulation in writing waive a failure to file the appeal bond within the time prescribed by statute, but in *Coleman v. Coleman*, 5 Haw. 300, in which appellee's counsel expressly withdrew an objection previously made on the ground that the costs had not been paid within the prescribed time, the court, in passing upon the contention made after the decision on appeal that the decision was void for want of jurisdiction, held that the objection of non-payment of costs had been waived and expressly overruled the *Paakuku* case in so far as it held that such an irregularity could not be waived by counsel, but stated also that it was distinguishable inasmuch as the question of want of jurisdiction had been raised in it, but had not been raised in the case then before the court, prior to the decision. The *Coleman* case has been considered as establishing the proposition in this jurisdiction that defects of the kind now in question may be waived by counsel and are waived by express stipulation to that effect prior to the expiration of the time prescribed by statute or by

failure to raise the question at all until after decision. See *Spooner v. Rice*, 11 Haw. 429; *Est. of Kamakula*, 12 Haw. 264; *Hind v. Wilder Steamship Company*, 14 Haw. 219.

If there was a waiver in the present case it was by implication. What is sufficient to show such a waiver? A waiver partakes to some extent of the nature of an estoppel. It is sometimes called a quasi-estoppel. In general, unless it is express, it is shown either by such laches or by such inconsistent action as shows an intention not to rely upon the objection. For instance, moving for or consenting to repeated continuances after opportunity to raise the objection might be regarded as sufficient laches, and joining in error or submitting or agreeing to submit the matter upon its merits might be sufficient action of an inconsistent character. But what were the facts here? There is nothing but the affidavit of defendants' counsel to show what was done by plaintiff's counsel before he raised the objection. It does not appear upon what Judge Lindsay based his opinion. Even if he found that there had been a waiver, he was in no better position than this court is to pass upon this question, for he had nothing before him but the affidavit referred to. There was nothing in the affidavit of which Judge Gear did not have as full knowledge and notice as the affiant. No counter affidavit was necessary. And yet Judge Gear did not find that there was a waiver but entertained jurisdiction upon the express ground, which we have held unsustainable, that the bond was filed in proper time. From his knowledge of the facts or his construction of the affidavit in the light of the facts as he knew them, he may have been of the opinion that there was no waiver. But let us assume that he did not so find, and take the affidavit at its face value.

The affidavit was apparently drawn with care with a view to making out as strong a case for the movant as the facts would warrant. It is not pretended that it shows laches. It can be relied on, if at all, only as showing inconsistent action, that is, that the plaintiff's counsel consented to a hearing of the motion on its merits and thereby waived the right to take the inconsistent position of contending that it was not properly before

the court. But it is at best ambiguous, in so far as it is intended to show that plaintiff's counsel consented to an argument of the motion upon the merits. The material part for present purposes is as follows: "That said motion (for a new trial, filed May 31) was set for argument on Friday, June 3rd last, being the eighth day after said verdict was rendered; that at the time set for argument of said motion defendants' counsel appeared, but plaintiff's counsel sent word to the court that he was not ready, being otherwise engaged; whereupon argument on said motion was postponed at the request of plaintiff's attorney until this Tuesday, June 7th, at which plaintiff's attorney moved that defendants' motion be dismissed for failure to file a bond as above mentioned, having given no intimation previously of his intention so to do. Wherefore this affiant respectfully submits that he waived the same." This shows merely that plaintiff's counsel sent word to the court that he was not ready and requested a continuance because he was otherwise engaged. It is doubtful whether the date, June 7, was set by the court of its own motion or on the suggestion of defendants' counsel or at the request of plaintiff's counsel, that is, whether the postponement alone was at such request or the postponement to the particular day. It is at least still more doubtful whether plaintiff's counsel intended to agree to argue the motion upon its merits. We say "at least" because it seems so clear as to be hardly doubtful at all that no such consent was intended. The only possible contention for the defendants is that the plaintiff's counsel requested that argument on the merits of the motion should be continued, and that contention must be based solely upon an extremely ambiguous clause,—which should be construed most strongly against the defendants, particularly when they seek to show a waiver. Nothing was said of the merits of the motion. It would be most natural for plaintiff's counsel to request merely that the hearing of the matter should be postponed and that is the most natural construction to place upon the clause in question. Moreover, the word "argument" in that clause would naturally have the same meaning as the same word in the preceding clauses of the portion of the affidavit above quoted, where it can

mean nothing else than a hearing upon any questions that might properly arise upon the presentation of the motion. There is nothing whatever to indicate that either plaintiff's or defendants' counsel or the court made any allusion to the merits of the case or that there was any intention on the part of plaintiff's counsel to agree to argue the motion on its merits. The alleged setting of the argument for June 3 consisted merely of the usual notice given by the movant's counsel that the motion would be presented for argument on that date or as soon thereafter as counsel might be heard. It was not for counsel on one side to confine the argument to the merits of the motion. There was no duty on the part of plaintiff's counsel to point out failures on the part of the defendants before the expiration of the time prescribed by statute for perfecting the motion. It does not appear that plaintiff's counsel knew on June 3 that no bond had been filed. He did not even appear and object to the motion on other grounds. He merely sent word that he could not appear at all at that time, and asked that the matter be postponed for that reason. A waiver is a matter of intention shown expressly or by implication, as by laches or inconsistent conduct. No such intention appears here. It is obvious that the request for postponement was for a different purpose and was not inconsistent with an intention to make any available objections to the motion. Indeed, if the plaintiff waived its objection of no bond merely because it did not raise it on June 3 when it did not attend at all, there would seem to be even greater reason for holding that the defendants waived their objection of plaintiff's laches or inconsistent conduct, for they did not raise that until after they had argued the question of no bond on its merits and after they had moved for an extension of time in which to file a bond. It is unnecessary to say whether the attorney general could waive a right of the Territory of this kind. See *Peacock v. Republic*, 11 Haw. 404.

In *Little v. Jack*, 68 Cal. 343, it was held that an appellee did not waive the right to a dismissal of an appeal for want of an appeal bond by stipulating to advance the appeal on the calendar for hearing. The court said: "There has been no such

waiver in this case, unless the stipulation to have the case placed on the calendar out of its order for hearing constituted it. There is no allusion in the stipulation to the undertaking, and nothing to indicate an intention to waive it. By no rule of construction could it be held to be a written consent of respondent to waive the filing of an undertaking." In a concurring opinion it was said: "It does not appear that the respondent's counsel, when he signed the stipulation, contemplated giving such consent. The stipulation above mentioned was signed with another and different object and intent, and to predicate of it that it consented that no undertaking on appeal should be filed would be to attribute to it an intent entirely foreign to the intent for which the stipulation was entered into, and which was in the minds of the parties when it was executed. Where an intent plainly appears, another and a different one cannot be implied." In *Howard v. Malsch*, 52 Tex. 60, an appeal having been taken but the transcript not having been filed, the appellees moved for affirmance, which was denied. The appellants moved for leave to file the transcript. Appellees appeared and resisted the motion but the court allowed the transcript to be filed. Subsequently the cause was continued by consent, which was made known on the part of the appellees through resident counsel on behalf of absent counsel. It was held that there was no waiver of even formal objections to the bond. See also *James v. Dexter*, 112 Ill. 489, and *Bubb v. Cain*, 37 Kan. 692 (16 Pac. 89). Of the four cases cited contra, three, namely, *Ives v. Finch*, 22 Conn. 101, *Cason v. Laney*, 82 Tex. 317, and *Vernia v. Lawson*, 54 Ind. 485, are so obviously distinguishable from the present case as to require no comment. The remaining case, *Farnam v. Davis*, 32 N. H. 302, was an appeal from a justice of the peace which was entered at the October term, 1853, of the appellate court, at which term the plaintiff entered his appearance as appellee and the cause was continued. He did not move to dismiss the appeal for want of a sufficient bond until the March term, 1854. There was not a total absence of a bond, but the bond had only one surety instead of two, which were held necessary under a law which "required sufficient sureties." It

was held that this was an irregularity which could be waived, and which was waived, the court saying, among other things, "the irregularity, then, is one which may be waived by the appellee; and we think he is to be considered as having waived it, when, having had reasonable opportunity to avail himself of the objection by a motion to dismiss the appeal for that cause, he neglects to do so. The requirements of the statute for his benefit can be dispensed with only by his consent; but it cannot be considered unreasonable to him and it certainly is but just to the appellant, to hold that that consent is to be understood as given when he enters his appearance at the appellate court, and suffers a continuance of the cause, without a suggestion that his rights have been disregarded in the mode of taking the appeal." This case, while it goes further than any other case that has come to our notice, does not go as far as the defendants ask us to go in the present case.

In view of the foregoing it will be unnecessary to decide whether Judge Gear's order for a new trial by cable or subsequently by mail, was void upon the ground that it was made in California and outside of his jurisdiction, or on the ground that the mailed decision was made after the expiration of his term of office.

The motion to quash or dismiss is denied.

E. C. Peters, Attorney General, and *F. W. Milverton, Deputy Attorney General*, for the Territory.

S. H. Derby (Kinney, McClanahan & Cooper on the brief), for the defendants on the writ of error.

TERRITORY OF HAWAII *v.* J. T. McDONALD.

APPEAL FROM DISTRICT COURT, HONOLULU.

ARGUED MARCH 6, 1906.

DECIDED MARCH 8, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PHYSICIANS AND SURGEONS—*statute requiring annual fee held void.*

That portion of Act 48 of the Session Laws of 1905, which amends the first paragraph of Section 1068 of the Revised Laws, providing that "no license shall be granted under the provisions of this section unless the applicant shall pay an annual fee of \$10," is invalid and void on the ground that it discriminates between the holders of licenses under the amending act and the holders of licenses issued prior thereto.

OPINION OF THE COURT BY WILDER, J.

This is an appeal on points of law from the district court of Honolulu. Defendant was charged with violating Section 1068 of the Revised Laws, as amended by Act 48 of the Session Laws of 1905, for that he did at Honolulu during one month prior to October 6, 1905, practice medicine and surgery without having first obtained from the treasurer of the Territory of Hawaii a license so to do. Defendant was found guilty and appealed to this court. It appeared that he was practicing as a physician and surgeon on September 27, 1905, and prior thereto, and had taken out a license in 1900 and paid the fee of \$10 required by an applicant for such a license.

Defendant's points of law may be summarized as follows: (1) That the statute alleged to have been violated is invalid (a) in that it contravenes the constitutional guaranty of equal protection of the laws, and (b) in that it contravenes the constitutional prohibition against deprivation of liberty or property without due process of law, and (2) that the statute has no application to this defendant.

Defendant's point of law that the judgment of the district court was contrary to the law and the evidence was expressly abandoned in this court, and it was agreed by the parties that the charge should be regarded as practicing medicine without having paid the fee of \$10 required by Act 48 of the Session Laws of 1905, and we so regard it in this opinion.

Section 1068 of the Revised Laws prior to being amended read as follows:

"No person shall practice medicine or surgery as a profession in the Territory of Hawaii, either gratuitously or for pay, or shall offer to so practice, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practice, without having first obtained from the treasurer under seal of his department, a license in form and manner substantially as in this chapter set forth. Such license shall be granted only upon the written recommendation of the board of health.

"All licenses to practice medicine or surgery granted by the minister of the interior upon the recommendation of the board of health, and in force on June 8, 1896, shall remain in force, subject to the provisions of this chapter."

The first paragraph of that section was amended by Act 48 of the Session Laws of 1905, as follows:

"No person shall practice medicine or surgery in the Territory of Hawaii either gratuitously or for pay, or shall offer to so practice, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practice, without having first obtained from the Treasurer, under the seal of his Department, a license in form and manner substantially as hereinafter set forth. Such license shall only be granted upon the written recommendation of the Board of Health, provided, however, that licenses to practice Osteopathy may be granted to graduates holding diplomas from any legally chartered and regularly conducted School or College of Osteopathy, and further provided that a Certificate to practice Osteopathy has first been obtained from the State Board of Osteopathic Examiners of the State of California, until such time as there is an Osteopathic Board of Examiners appointed for the Territory of Hawaii.

"And provided further, that the practice of medicine as contemplated and set forth in this Act shall not be construed to exclude the use of any method or means or any agent either

tangible or intangible by any person licensed to practice Osteopathy, for the treatment of disease in the human subject, provided that no person so licensed to practice Osteopathy shall, by reason thereof, be authorized to administer drugs or medicines.

"Any person applying for a license to practice Osteopathy shall first file with the Treasurer a certified copy of such diploma and satisfactory evidence that the applicant is a fit and proper person to be so licensed to practice Osteopathy, and file with the President of the Board of Health a certificate from the Board of Osteopathic Examiners of the State of California, certifying that the applicant has passed the required examination, and is entitled to practice Osteopathy in that State.

"No license shall be granted under the provisions of this Section unless the applicant shall pay an annual fee of Ten Dollars."

Counsel for the Territory claims that, under the statutory rule of construction that when words of a law are dubious every construction which leads to an absurdity should be rejected, (R. L. Sec. 13), the last part of the amending section reading: "No license shall be granted under the provisions of this section unless the applicant shall pay an annual fee of \$10," should be held by this court to mean that all persons holding licenses should pay an annual fee or tax of \$10. But before this rule of construction can be invoked the words must be dubious. See Lewis' Sutherland Stat. Con. Sec. 367. In this case they are not either dubious or ambiguous. Because the amending act may be invalid if meaning what it says does not make the words of the act either dubious or ambiguous. Consequently, there is no reason to apply the statutory rule of construction referred to.

The Legislature has said in plain and unmistakable words that any one getting a license under the amending act shall pay an annual fee of \$10, and has failed to provide that those who held licenses prior to the enactment of the amending act should be treated in the same manner. It will be seen that only the first paragraph of Section 1068 was sought to be amended, leaving in force by the second paragraph all licenses issued prior to June 8, 1896. And even if the amending section were

treated as running from the time of the original enactment, namely June 8, 1896, still those licenses then in existence and issued prior to that date would not be affected by the requirement of an annual fee of \$10. Thus, there is a discrimination between the holders of licenses under the amending act and the holders of licenses issued prior thereto. Therefore, it is clear that that portion of the amending act providing that "no licenses shall be granted under the provisions of this section unless the applicant shall pay an annual fee of \$10" is invalid and void.

It is unnecessary to pass upon any of the other questions argued.

The appeal is sustained, the judgment of the district court reversed and the defendant discharged.

M. F. Prosser, Deputy Attorney General, for the Territory.

C. F. Clemons, (Thompson & Clemons on the brief,) for defendant.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES AND DAVID F. NOTLEY v. CECIL BROWN AND ANTHONY LIDGATE, PROPOSANTS OF THE WILL OF CHARLES NOTLEY, DECEASED, JOHN NOTLEY, A MINOR, VICTORIA M. K. NOTLEY, A MINOR, LILY NOTLEY, A MINOR, AND WILLIAM NOTLEY, A MINOR, BY W. S. WISE, THEIR GUARDIAN AD LITEM, AND EMMA DANFORD.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED FEBRUARY 5, 1906.

DECIDED MARCH 15, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

JUSTICE OF THE SUPREME COURT—*disqualification*.

A justice of the supreme court is not, in the absence of statute, disqualified to sit in a case by reason of having been before his appointment to the bench counsel for one of the parties in the case, even where he has taken an active part in the case and advised upon the questions in issue.

OPINION OF THE COURT BY WILDER, J.

(Frear, C. J., dissenting.)

This is a writ of error to the circuit court of the fourth circuit. On a motion to quash the writ defendants in error claimed that Mr. Justice Hartwell was disqualified by reason of having acted as counsel for some of the parties in, and taken an active part in some previous stages of, the case. Plaintiffs in error contended that there was no disqualification either on the main case or on the motion to quash.

Of late years it has been the common practice for a justice of this court to refuse to sit in a case where the slightest suggestion was made as to his having formerly been of counsel in the cause. This practice has been checked and disapproved of by

the ruling of this court in the recent case of *Love v. Love*, 17 Haw. 194, which, so far as appears, was the first time the matter was ever contested and adjudicated, where it was held that a justice of this court is not disqualified to sit in a case by reason of having been counsel of record as a member of a partnership which had been retained in the case, he having taken no active part in the case nor advised upon the questions at issue. No opinion was expressed as to disqualification in case he had taken an active part in the matter and advised in regard to the questions at issue. The latter question being squarely up for decision in this case, it must be decided according to the law irrespective of what the court thinks should or ought to be the practice.

Attention is directed in the first place to the statute by which a circuit judge may be called in as a member of this court. This statute reads as follows: "Parties to causes pending before the supreme court shall be entitled to a hearing before all of the justices thereof and may not be compelled to go to trial before less than the full number thereof. Provided, however, that if any of the justices of the supreme court shall be disqualified from sitting in any cause pending before the supreme court or shall be unable to attend from sickness, accident or any other reason his or their place or places for the trial or determination of such cause shall be filled by one or more of the circuit judges," etc. R. L., Sec. 1634, as amended by Act 92, S. L., 1905. It is not claimed that there is any reason except that of alleged disqualification why Mr. Justice Hartwell should not sit in this case. In view of the statute it would seem that a justice has no right to withdraw from, and it is his duty to sit in, a case unless he is disqualified or unable to sit for some other specified reason.

Section 84 of the Organic Act provides: "That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested either as a plaintiff or defendant or in the issue of which the said judge or juror may have, either directly or through

such relative, any pecuniary interest." Thus, disqualification by relationship and by reason of pecuniary interest is provided for. If the provisions of this section are exclusive, then there is no disqualification, and, if they are not exclusive, a disqualification can only exist if it is according to the common law. In view of the conclusion reached it is not necessary to say whether the statute is exclusive.

The principle that a man may not be a judge in his own cause is of universal acceptance and cannot be questioned. An alleged disqualification by reason of having been of counsel is of recent origin and created by express constitutional or statutory provisions. As it may exist independently of relationship or pecuniary interest in the result, it was doubtless based upon considerations of supposed bias, partiality or prejudice arising from the relationship of attorney and client, which may reasonably be presumed might influence the actions of the judge. *Newcome v. Light*, 58 Tex. 141. One who is biased, prejudiced or partial should not be a judge, but, in the absence of statute, such a person is not disqualified. As the common law did not disqualify for bias, prejudice or partiality, which gave rise to the rule, it follows that at common law there was no such disqualification as that of having been of counsel.

Most of the reported cases are not of much assistance, because in nearly every jurisdiction they are controlled by statute. But that in the absence of statute there was no such disqualification at common law is the holding by the great majority of the cases. As the question is an important one, all the citations in point on the subject we have been able to find are referred to.

"At the common law as it prevailed in England, and was adopted by the people of the United States, there could be no challenge or recusation of judges on the ground that the judge had been of counsel. See Coke, Litt. 294; 2 Bro. Civ. & Adm. Law, 369; 3 Bl. Com. 361; *Lyon v. State Bank*, 1 Stew. 442." *The Richmond*, 9 Fed. 863.

In *Thellusson v. Rendlesham*, 7 H. L. Cas. 429, a court constituted of so many members that it could with slight inconvenience dispense with the participation in a hearing of one of

the peers, Lord St. Leonards stated that he had on two occasions been of counsel in a cause though not upon a point then pending, but that he "did not conceive that these facts absolved him from the duty of taking part in the hearing." Lord Brougham trusted that it would not be assumed that the having been of counsel in a cause operated as a disqualification to prevent the same person, when raised to the bench, from taking part in the decision of that cause. The Lord Chancellor, who was of counsel for one of the appellants in the court below, held that he was not disqualified. He heard the argument, saying that he did not intend to take a part in the decision as a matter of personal feeling unless there was an equal division of opinion. No one dissented from these views.

Tatham v. Wright, referred to in the above case, came before the lord chancellor, who had been of counsel in the cause, on an application for a new trial. He obtained the assistance of two learned judges, Chief Justice Tindal and Mr. Baron Alderson, and having done that he himself took part in pronouncing the decision.

In the *Bank of North America v. Fitzsimmons*, 2 Bin. 454, it was held that it was no objection to a judge that while at the bar he had been consulted and had given an opinion in favor of one of the parties. Cited in *The Richmond*, 9 Fed. 863.

In *Den v. Tatem*, 1 N. J. L. 190, it was held to be no objection to a judge, before whom a jury is to be struck, that he has been of counsel with one of the parties.

In *Morgan v. Hammett*, 23 Wis. 30, it was held that the fact that the county judge had been of counsel for some parties interested in the matter of an administrator's sale of real estate to pay debts did not disqualify him from acting upon an application for a license to sell.

In *Townsend v. Hughes*, 2 Mod. 151, Scroogs, J., said he was of counsel with the plaintiff, before he was called to the bench, but now he had forgotten all former relations and thereupon delivered his opinion. Cited in note to 25 L. R. A. 117.

It was said in *Re Nevitt*, 117 Fed. 451: "What constitutes disqualification? Speaking generally, the answer may be:

Interest in the subject matter of the litigation, relationship to one or more of the parties to it and statutory prohibitions."

In *Owings v. Gibson*, 2 A. K. Marsh 515, it was held that an alleged surprise in this, that the presiding judge had been counsel for plaintiff, and defendant did not expect that he could sit and therefore did not prepare himself, is not a sufficient cause for a new trial. Prejudicial motives may prevent a judge formerly counsel from sitting in a cause, but sitting or not is discretionary with the judge.

In *Blackburn v. Craufurd*, 22 Md. 447, it was held that the fact that a judge had been counsel in a case theretofore tried between two of the parties to the bill, which involved some of the issues raised in the bill, did not bring him within the letter or spirit of the constitutional inhibition against sitting in a case wherein he may have been of counsel. Cited in *The Richmond*, 9 Fed. 864.

"It is worthy of observation that at common law judges were not subject to the same disqualifications as jurors, and there are at the present time many grounds of challenge to a juror which are not applicable to judges. At common law the only ground upon which a judge could be excluded from acting was interest in the cause. This disability was founded upon the maxim that no man can be judge of his own cause. Consanguinity to either of the parties, though good cause of challenge to a juror, did not disqualify a judge, for favor would not be presumed in a judge." *In re Dodge*, 77 N. Y. 112.

In Texas, where the constitution disqualifies a judge when he was of counsel in the case, it is recognized that at common law that was no disqualification. *Taylor v. Williams*, 26 Tex. 586.

At the older common law personal interest formed the only ground for challenging a judge. *Russell v. Belcher*, 76 Me. 502.

In *Heflin v. State*, 88 Ga. 151 (30 Am. St. Rep. 147), it was held that a judge is not per se disqualified to preside on the trial of an indictment for perjury because he is convinced of the guilt of the accused and has privately and unofficially advised the prisoner's counsel to induce his client to plead guilty. In Georgia the having been of counsel is a statutory disqualification.

Moses v. Julian, 45 N. H. 52, and *Tampa Street Railway Co. v. Tampa Suburban Railway Co.*, 11 So. (Fla.) 562, on which latter case *State v. Hocker*, 25 L. R. A. (Fla.) 114, was based, are cases which may be claimed to hold that even in the absence of statute a judge is disqualified who has been of counsel in the case. But in New Hampshire the bill of rights provided that "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit," and there was also a statutory provision that a justice of the supreme court could not sit upon the trial of any cause in which he had been concerned as party or attorney, which statutory provision the court held was applicable to all judges and judicial officers. In that case the judge of probate who allowed the will wrote the will while he was judge in the face of a constitutional provision prohibiting him from acting as attorney or being of counsel, the effect of the constitutional provision being held to "disqualify the judge to sit in the hearing or decision upon the proof of such a will." And in the Florida case there was no statute at the time, although there had been previously, and the practice had grown up of considering this a disqualification even after the repeal of the statute. But, as a matter of fact, it was held that the judge in question was not disqualified, the record showing only that he had advised complainant on matters irrelevant and immaterial to the case made out by the bill.

As we find there is no legal disqualification, a justice of this court, from a sense of delicacy or personal feeling, has no right to withdraw from sitting in a case, because, if there is no disqualification or other reason mentioned in the statute, a circuit judge cannot be called in and the case cannot be heard, as the parties are entitled to a hearing before a bench of three members.

It is the opinion of this court that Mr. Justice Hartwell, on the facts stated, is not disqualified from sitting in this case either on the merits or the motion to quash.

Kinney, McClanahan & Cooper and *Ballou & Marx* for plaintiffs in error.

Holmes & Stanley for defendants in error.

CONCURRING OPINION OF HARTWELL, J.

The plaintiffs' counsel, for whom I argued about two years since a motion for rehearing of his exceptions, insists that I am not thereby disqualified from now sitting in the case and that therefore it is my duty to do so. This is denied by the defendants' counsel who insists that it is my duty, under the circumstances, to decline.

It is not expected that argument will be presented in any of the matters brought up by the writ of error which were passed upon by this court in overruling the exceptions. As far as those matters are concerned if a writ of error lies, following a bill of exceptions, the judgment below would be affirmed as a matter of course. As to new grounds of error, not passed upon in connection with the bill of exceptions, I am conscious of no bias or prejudice which would influence my consideration of them, but I should be very glad to be allowed to retire; not because I think that injustice would result to either party by my remaining but because a decision that I am not disqualified, under the circumstances, would be a precedent in all cases in which a justice had formerly been of counsel, to whatever extent he had participated in them, excepting only cases which involved a pecuniary interest, which is a constitutional disqualification.

No distinction can be made between circumstances which do and do not disqualify in case of a former relation as attorney and client. The fact of being retained establishes that relation and would incur the danger of favoring the client or of giving that impression as fully as when advice was given, argument made and sympathies or antagonism aroused. *Love v. Love*, therefore, ante, p. 194, which held that a member of this court was not disqualified because his law firm had been retained for one of the parties, he himself having taken no part in the case, is a precedent in this case, or else was wrongly decided and ought to be disregarded. It is for no other reason than to avoid

danger of favoritism, as a result of bias, from whatever cause, or of giving the impression of favor, that the former relation of attorney and client is regarded as a disqualification. But bias or prejudice, although a cause of disqualification in many jurisdictions, is not so at common law or in Hawaii. It may exist in many instances, as, for example, in cases of intimate friends or opponents or in a case, the issue of which as precedent, would affect their interest or those of the judge himself although not in pending or impending cases. Danger of favoritism, under such circumstances, is greater for the very reason that it is less conspicuous. It is true also that it is not so much conscious bias or prejudice as unconscious cerebration, which the judge himself does not recognize, that may affect his impartiality. It is upon these considerations that when the relation of attorney and client disqualifies a judge he is not permitted to sit in the case although the parties may waive the objection and request him to do so.

Upon the whole, then, it seems to be clear that the disqualification, if it exists, is imperative and cannot be waived. In all such cases either the judge must retire from them or must sit in them. He has no discretion to do the one or the other as may seem to him, as well as to the attorneys, to be just and appropriate. The question presented is extremely difficult to answer satisfactorily. The conclusion which I have reached, in concurring as I do in the opinion of the court as stated by Mr. Justice Wilder, is based upon considerations of constitutional law from which I do not feel at liberty to depart.

Until the decision in *Love v. Love*, supra, the right of this question had not been adjudicated, no controversy concerning it having been presented, although since the act of 1892, which provided for substitute judges, it was uniform practice that a justice who had been of counsel retired as a matter of course and a substitute judge was called in his place. Prior to that act, and more especially before the number of justices was increased from three to five by the act of 1888, there were occasional exceptions in the practice, although I cannot specify them. The risk of a failure of justice in case of disagreement was more

obvious during the years prior to 1877, when Chief Justice Allen was minister to Washington, and was avoided in exceptional cases by a waiver of the objection. It was then considered doubtful whether this was a strict disqualification and also, if it was, whether it could be waived. It was generally supposed, however, that the matter was discretionary with a justice to sit or not. All the constitutions of Hawaii, as well as the Organic Act, make relationship, pecuniary interest and former judgment causes of disqualification. The constitution of 1887, followed by that of 1894 and the Organic Act, restricted relationship to the third degree and added affinity.

The decision on the question is not to be made by mere construction of law and does not depend upon the theory that enumeration of certain causes of disqualification implies that others are intentionally omitted, for the theory expressed in the maxim *expressio unius est exclusio alterius* is not a rule of law, —the intention in such instances is merely inferential. The decision of this question rests upon something more than inference. Constitutional authority for a justice to refuse to perform his judicial functions must affirmatively appear or else he is at liberty to exercise his own discretion in refusing or consenting to perform them for reasons which appeal to himself and to his colleagues, as well as to the attorneys in the case, to be good reasons although not authorized by law. The law, however, does not permit such exercise of discretion. The Organic Act, which is our constitution, requires that "the supreme court shall consist of a chief justice and two associate justices," with the proviso that "in case of the disqualification or absence of any justice thereof his place shall be filled as provided by law." The statute provides for calling in a circuit judge "who has not been connected with the case as counsel or in an official capacity," and, as amended in 1903, "who is not otherwise disqualified." This amendment was made, I think at my suggestion to a committee of the bar association to whom the bill was referred, because of an impression, which I now think was unfounded, that other causes of disqualification than those which were named in the law might exist. But constitu-

tional law cannot be modified by the amendment or by any statute. The requirement that only such circuit judges can be called in who have not been connected with the case as counsel or in an official capacity does not imply that justices of the supreme court are subject to the same requirements.

If any former official connection with a case disqualified justices of this court it would be impossible to obtain rehearings of the same case presented under any circumstances. The reason why the statute excludes substitute judges who have been of counsel and does not make the same requirement of justices of this court may well be that it was thought that the legislature had no power to add to the disqualifications made by the Organic Act or that, if there were such power, it was unwise to make a rigid rule applying to them. Whatever the reason, however, the disqualification is not extended beyond circuit judges.

The disqualification referred to in the proviso of the Organic Act (Sec. 82), as well as in the statute (Sec. 1634, R. L.), is either the disqualification which is expressed in the act or else it is one which is undefined by law. *Taylor v. Williams*, 26 Tex. 587, held: "Where the constitution has only prescribed that the judge's professional connection with the case, in the single instance where he has been 'of counsel in the cause,' shall disqualify him from presiding upon its trial, we cannot undertake to say that his professional connection with a similar cause or one involving the same questions shall have that effect. If we depart from the plain language of the constitution, we shall be left without a rule for our guidance, and shall countenance a laxity of construction that may prove both dangerous and inconvenient." And so 121 Mo. 514; 83 Cal. 589; 103 Ib. 397; 123 Ib. 453. *Moses v. Julian*, 45 N. H. 52, held that a probate judge could not pass upon a will drawn by himself while on the bench, under the constitutional prohibition of any judge acting as attorney to any party or "as advocate or counsel in any probate business which is pending or may be brought into any probate court in the county of which he is judge." While holding that "the prohibition of the constitution applies to this case," the court went on to say that the

judge was disqualified on the principle of "bias or prejudice in favor of or against one of the parties." *State v. Hocker*, 34 Fla. 29, held that a judge was disqualified in a case in which he had been of counsel, upon the principle that "no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent," citing decisions in Massachusetts, Michigan, Texas and New Hampshire based upon constitutional or statutory provisions. The Florida decision might have been based upon a statute that if a party files an affidavit "that he has reason to believe that he cannot obtain justice from one or two of the judges of such court by reason of the prejudice of such judge or judges then such judge or judges shall be disqualified to sit in such case." *Ten Eick v. Simpson*, 11 Paige 177 (1844), held that the vice chancellor could not properly pass upon an appeal bond in a case in which, before his appointment, he was of counsel, the court saying that the principle was the same "which this court applied to the case of a master who had acted as the counsel for one of the parties in a prior stage of the suit, in the case of *McLaren v. Charrier*, 5 Paige, 530," and that "it is the same principle which disqualifies a judge from acting as such in a cause in which he has been, at a previous time, the solicitor or counselor of one of the parties." But the case of the master, who had acted as counsel prior to his appointment was within the statutory prohibition, 2 Rev. St., N. Y. 275, Sec. 6, a later statute providing that "No judge shall have a voice in the decision of any cause in which he has been counsel, attorney, or solicitor, or in the subject-matter of which he is interested." Laws of N. Y., 1847, Ch. 280, Sec. 81. In *Walker v. Rogan*, 1 Wis. 511 (1853), there was no controversy concerning the disqualification of the judges who declined to sit by reason of having been of counsel, but in *Morgan v. Hammett*, 23 Wis. 31 (1868), the court held that a county judge who had been of counsel for parties interested in an administrator's sale of real estate was not thereby disqualified from acting upon an application for a license to sell, the court saying: "An examination of the various provisions of our statute bearing upon this subject has convinced each of

us that this view must prevail." It appears that at the date of these decisions "The 20th section of chapter 87, and the 11th section, on page 761 of the Revised Statutes, deprives the judge of the Circuit Court absolutely of all jurisdiction in any cause pending before him in which he is interested, or where he shall have acted as counsel for either of the parties." *Hungerford v. Cushing*, 2 Wis. 293. The decisions cited had statutory authority with the exception of that one which was shortly followed by a statute, while in this jurisdiction the only adjudication is that the relation per se does not disqualify.

There is no authority in the Organic Act for refusing to sit in such cases as this. The act fixes the constitution of the court in all but the cases therein named.

DISSENTING OPINION OF FREAR, C.J.

The question is whether a member of this court is disqualified to take part in the decision of a case in which he was actively engaged as counsel before his appointment to the bench. It has been decided in *Love v. Love*, ante, 194, that a member is not disqualified from the mere fact that he was of counsel of record in the case as a member of a partnership that had been retained, but in which he had taken no part and given no advice.

It is commonly stated, and no doubt correctly, that having been of counsel was not an absolute disqualification at common law, although the cases in support of this statement are comparatively few in number and as a rule of an unsatisfactory nature. But it is everywhere held, in both England and America, that it is extremely desirable to avoid not only the evil of bias and prejudice on the part of a judge by reason of his having been of counsel, but also the appearance of such evil, and that a judge who has been of counsel should as a matter of propriety at least decline to sit except in a case of necessity, as, for instance, when the court consists of only one judge and there is no provision for a special or substitute judge. This probably accounts for the paucity of decisions on the question, for as a fact judges have generally declined to sit when they have been of counsel. Indeed, such has been the consensus of opinion as

to the impropriety of a judge sitting in such a case that, to quote from 17 Am. & Eng. Enc. of Law, 2d Ed., 739, "At the present time * * * it is usually if not universally provided in the constitutions or statutes of the different states that one who has been of counsel in the case may not act as judge."

In some cases the mere fact appears that one who had been counsel of record at one stage of the case has taken part as a member of the court in deciding the case at a later stage, no question being raised. In other cases there are mere dicta to the effect that having been of counsel is not a disqualification. In some cases the court has apparently not cared to take the broad ground that that would not be a disqualification, but instead has confined its decision to the precise facts of the case and held, for instance, that the judge was not disqualified merely because he had been of counsel for the same parties in other matters. See *Carr v. Fife*, 156 U. S. 494, 498; *In re Nevitt*, 117 Fed. 448, 452. Some cases, however, intimate strongly or actually hold that, even in the absence of constitutional or statutory provision, having been of counsel is an absolute disqualification. In *Walker v. Rogan*, 1 Wis. 511, decided forty-five years before the statute expressly made it a disqualification for a judge of the supreme court to have been of counsel, two of the three judges declined to sit because they had been of counsel. "The obvious consequence was," as the court stated (p. 519), "that the cause must remain undetermined until the constituent members of the court should be changed, or until the legislature should provide for the contingency, or unless the parties should, by stipulation, obviate the difficulty." The difficulty was obviated by a stipulation that the case might be heard and decided by the third judge sitting alone. In this Territory the statute provides for special or substitute judges in case regular judges are disqualified. R. L., Sec. 1634. In *Tampa S. R. & P. Co. v. Tampa S. R. Co.*, 30 Fla. 595 (17 L. R. A. 681), the court said, among other things in holding that a judge who had been of counsel would be disqualified: "In reaching the conclusions announced above we have not overlooked the fact that there is now no statute in this state

expressly declaring that the previous relation of counsel to a party to the cause in the matter in controversy shall disqualify a judge, nor the further fact that there are decisions which intimate or affirm the view that such relation does not disqualify. * * * It has always, so far as we know, been the practice of the circuit and supreme court judges to refuse to sit in cases in which they have been of counsel to either of the parties. * * * The records of the courts of this state are full of orders and entries made, * * * recognizing the stated relation as disqualifying a judge; and that it does have this effect here is as fully settled by years of unvarying recognition and enforcement as any other principle of law, and we have no hesitation in affirming either its propriety or its binding force upon the supreme and circuit courts and judges." That ruling was followed in *State v. Hocker*, 34 Fla. 29 (25 L. R. A. 117, and note). In *Moses v. Julian*, 45 N. H. 52, which contains the fullest discussion of the whole subject of disqualifications of judges, the court said: "Among this class of disabilities (friendly or hostile relations) is that chiefly in question in this case, the fact that the judge, as is alleged, has acted as counsel for the party in the same cause; which has always been held everywhere to justify the supposition and belief that, however upright he may be, he cannot avoid favoring the cause of his late client. It is consequently everywhere a just cause for the judge to withdraw, or for the party to recuse him. * * * Our own reports abound with entries that —, J., having been of counsel, did not sit, and the dockets furnish evidence abundant that the law which called for such entries was recognized and acted upon long before we had reports. * * * It seems to us very clear, that, a fortiori, the acting as advocate and giving of counsel in a case, whence a cause in court may spring up, after the judge has received his appointment, must be good cause of disqualification as a judge, independent of any statutory enactment. It is the fact that the judge has acted as attorney, counsel, law advisor or advocate, in relation to the business in hand, that furnishes the just cause of exception, without reference to the time when such aid or counsel was

given." The court regarded the general constitutional provision, referred to in the majority opinions in this case, as a mere statement of a common law principle inserted in the constitution to avoid doubt or to prevent the legislature from repealing it. There were other specific constitutional provisions which applied to that case, but not to cases in which a judge had been of counsel prior to his appointment. In *Ten Eick v. Simpson*, 11 Paige 177, decided three years before the statute on the subject, Chancellor Walworth said: "I am not prepared to say that any provision of the revised statutes prohibits the vice chancellor from approving the appeal bond, in a case in which he was solicitor or counsel previous to his appointment to office. * * * The principle, however, which this court applied to the case of a master who had acted as the counsel for one of the parties in a prior stage of the suit, in the case of *McLaren v. Charrier*, (5 Paige's Rep. 530,) seems to be equally applicable here. It is the same principle which disqualifies a judge from acting as such, in a cause in which he has been at a previous time the solicitor or counsel of one of the parties. In such cases he should decline to act, in his judicial capacity, in any matter requiring the exercise of judgment or judicial discretion; unless in a case of necessity and to prevent a failure of justice, as in a case where there is no other judicial officer who has the power to do the act required to be done by him."

There is greater reason here than elsewhere for holding a judge disqualified by reason of having been of counsel because the statute, if it is valid, deprives the members of the court of the power and duty, which is always recognized in connection with the common law rule, to decline as a matter of propriety to sit except in rare cases of necessity. The statute makes it the duty of a member of this court to sit in all cases in which he is not absolutely disqualified or absent, for it provides (R. L., Sec. 1634) that parties shall be entitled to a hearing before all the justices, and may not be compelled to go to trial before less than the full number thereof, with the proviso that in case of the disqualification or absence of any of the jus-

tices in any particular case his place may be filled by a circuit judge; and it would not be competent for the legislature to authorize a special or substitute judge to take the place of a justice of the supreme court except in a case of disqualification or absence. See Org. Act, Sec. 82. This statute, moreover, seems to recognize that having been of counsel is a disqualification, for it provides that the circuit judge who fills the place of a disqualified or absent supreme court justice shall be one who has had no connection with the case as counsel. It might be contended, from the fact that this is specifically mentioned in connection with substitute judges, that it was supposed or intended not to be the law in regard to regular members of the court, but a different view of special provisions of this general character has been taken by other courts. For instance, in the Florida case above quoted from, the court held that a somewhat similar statute "merely recognized such relation of counsel and client as one, among many, causes of disqualification." Likewise in the New Hampshire case above cited the court held that the statute which related to only one court "must be regarded as a legislative recognition of the common law applicable to all judges and judicial officers." So, in the Wisconsin case referred to, the statute at that time applied to the circuit courts only. Moreover, our statute, as amended in 1903, after stating that the substitute judge or judges should have had no connection with the case either as counsel or in an official capacity adds, "and who is or are not *otherwise disqualified*," thus implying that having been of counsel was a disqualification.

But what would seem to be conclusive in this jurisdiction is that having been of counsel has become established as a disqualification by the common law of Hawaii as shown by usage and judicial precedent. As stated in the Florida and New Hampshire cases above mentioned with respect to their reports and records, our reports and records are full of entries recognizing the relationship of counsel as a disqualification. The following are some of the cases in which a member of this court has not sat because he had been of counsel: 3 Haw. 85; 5 Haw. 456; 7 Haw. 4, 12, 129, 226; 8 Haw. 40, 93, 330; 9 Haw. 1,

23, 43, 75, 101, 121, 151, 166, 335, 337, 412, 417, 514, 566, 10 Haw. 319; 11 Haw. 272; 13 Haw. 4, 28, 138, 328; 14 Haw. 399; 16 Haw. 45, 53, 66, 113, 185, 282, 476, 485, 489, 502, 535, 544, 564, 567, 585, 605, 638, 660, 674, 685, 702, 737, 761; 17 Haw. 41. These fifty-four cases cover a period extending from 1868 to the present term. In some, especially those decided in the last few years, the particular ground of disqualification is not set forth in the report, although shown in the record of the case. The list does not include all the cases in which members of the court have not sat because they had been of counsel. The frequency of such cases has varied from time to time according to the number of cases that have come before the court, according to the frequency of changes in the membership of the court, according to whether a new member has been appointed directly from the bar or from the circuit bench or from some other office or from abroad, or for any other reason had not for some time previously been in practice to any great extent or at all, etc. The circumstances were such that prior to 1868 there could have been but few, if any, such cases. One of these cases, that reported in 16 Haw. 66, was a previous stage of the case now before the court, in which the same justice now in question was held disqualified for the same reason that is now urged. He had argued before this court a motion for a rehearing in the case. After his appointment to the bench a circuit judge sat in his place on a second motion for a rehearing. The case was then before the court on exceptions. The same case is now here on error, and many of the same questions are raised, although they may be disposed of on the ground that they were decided on the exceptions. It does not appear whether prior to the enactment in 1892 of the section which as subsequently amended is now R. L., Sec. 1634 above referred to, the judges declined to sit in the exercise of their discretion as a matter of propriety or because they were regarded as disqualified, although the mere repeated entries that they did not sit for that reason was regarded as sufficient for establishing the law in the Florida and New Hampshire cases above referred to. Prior to the enactment of that statute the court was

expressly authorized to decide according to reason or to adopt the principles of the common law or of the civil law, when founded in justice and not contrary to Hawaiian law or usage. See note to R. L., Sec. 1. Under the civil law, having been of counsel was a disqualification. This was one of the classes of cases in which the court might naturally have declined to follow the common law. But, whatever may have been the view taken before the enactment of that statute, there can be no doubt that since its enactment the reason for not sitting has been that the judges were regarded as disqualified. These cases, decided since the enactment of that statute, constitute the great majority and cover all or nearly all reported after the close of the eighth volume of the reports. In some instances the judge himself has mentioned that he had been of counsel and the attorneys have at once conceded that that was a disqualification. In other cases the objection has been raised by counsel, and in all or nearly all cases the question has been merely whether the judge had in fact been of counsel in the particular case, and upon the establishment of that fact it has been taken for granted by court and counsel that he was disqualified. In only two cases, namely, in *Love v. Love*, above referred to, and the present case, have counsel taken the position that the judge was not disqualified, and in these cases that position was taken for special reasons or under special circumstances and upon the suggestion from the court that that was the only way, if there was any way, in which a certain desired object could be attained. The case of *Love v. Love* may have gone too far. If it did, it should be overruled. If it did not, it went at least far enough and should not be extended. The court in that case confined its decision to the facts of the case and expressly declined to express an opinion upon a case, like the present, in which the judge had taken an active part as counsel. Since the enactment of the statute which allows substitute judges only in cases of disqualification or absence of regular judges, it has frequently been mentioned by the court, sometimes in response to an expression of consent by counsel to a judge sitting who had been of counsel, that it was not a matter of discretion with the judge but that

if he was disqualified he should not sit, and if he was not disqualified he should sit, and that if he was disqualified it was at least questionable whether the disqualification could be waived by counsel. It has been remarked also from time to time that the statute permitted a substitute only in a case of disqualification or absence and not in case a judge who was present and not disqualified should decline to sit. In practically all the cases reported in the ninth and subsequent volumes of the reports it is distinctly stated that the judge did not sit because he was "disqualified" and not merely that he did not sit or declined to sit, and a substitute was requested in writing to sit in his place under the statute on the ground that he was "disqualified" because he had been of counsel, it being recognized that no substitute could be called in unless the judge was disqualified or absent. Thus not only has there been the practice but there have been repeated adjudications. The practice alone might be sufficient. The repeated adjudications would certainly seem to be sufficient even if made inadvertently. But, as matter of fact, they were made advertently. The fact that no contest was made except upon the question whether the judge had in fact been of counsel in the particular case or not, does not alter the situation. The fact of acquiescence with knowledge on the part of bench and bar shows a general recognition of that as the law. As stated in the Florida case, the law "here is as fully settled by years of unvarying recognition and enforcement as any other principle of law." If this does not establish the law here, in the absence of a statutory or constitutional provision to the contrary, it is difficult to see how a rule of law can be established by practice or precedent except by judicial decision in so many words after a contest on the particular point. To hold that the law has not thus become established here would be practically to elevate the common law of England to the position of constitutional or statutory potency in this Territory.

Thus it seems clear that unless there is some constitutional or statutory provision to the contrary it is established by precedent and usage in Hawaii that having been of counsel is a disqualification. The only statutory or constitutional provision

relied on to the contrary is Section 84 of the Organic Act, which reads as follows:

"That no person shall sit as judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror may have, either directly or through such relative, any pecuniary interest. No judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment."

If this establishes the law to the contrary, it is only on the principle of *expressio unius est exclusio alterius*. I appreciate the force of this argument. And yet this maxim, as often stated, is merely an aid to construction and is not of universal application and should be applied with great caution. The argument at best is one of mere inference and the inference is not a necessary one. No doubt under this maxim the first sentence of the section quoted is exclusive as to the matters, namely relationship and interest, to which it relates. For instance, under it, relationship beyond the third degree would not disqualify. But it does not follow that it is exclusive as to other matters. Its enactment may be fully accounted for on other grounds than that it was intended to be exclusive. It was fully justified in order to fix the degree of relationship and make it apply to relationship by affinity as well as consanguinity. Likewise the second sentence is doubtless exclusive as to the matters to which it relates, and especially as those matters would not be disqualifications in the absence of any such provision. It is easy to see that if the second sentence stood alone, as it does in some state and federal statutes (see *Spreckels v. De Bolt*, 16 Haw. 476), it could not be regarded as excluding other disqualifications; it would be absurd to say that it would permit a judge to sit in a case in which he was an interested party. It could also hardly be seriously contended that either portion of this section would permit by implication one to act as both judge and counsel in a case at the same time, especially in view of R. L., Secs. 1619, 1620. See *McGregor v. Crane*, 98 Mass. 530, and the New Hampshire case above cited. In the Florida case the court held that a provision corresponding to the first part of this section

was not exclusive, saying, "We do not understand, nor is there any sanction for the opinion, that the act * * * declaring interest and consanguinity or affinity to be grounds of disqualification, and prescribing the practice in such cases, to be an exclusion of any of the other established grounds of disqualification."

The Texas, Missouri and California cases cited contra in the opinion of Mr. Justice Hartwell do not seem to be in point. The Texas case held merely that a provision against sitting in a case in which the judge had been of counsel would permit him to sit when he had been of counsel in a different though similar case, very much as our provision against a judge sitting when related to a party in the third degree would permit him to sit when related beyond that degree. In the Missouri case the question was not involved, and there was an express provision making it a disqualification to have been of counsel. The California cases, not to mention distinguishing features of the individual cases, were decided under a code which was supposed to cover the entire law.

Both sentences of this section of the Organic Act have, with some modifications, been part of the constitutional law of Hawaii for more than fifty-three years, the first sentence having been article 11 of the constitution of 1852, article 10 of the constitutions of 1864 and 1887 and article 89 of the constitution of 1894, as well as a part of section 820 of the civil code of 1859; the second sentence having been article 92 of the constitution of 1852, article 72 of the constitutions of 1864 and 1887 and article 88 of the constitution of 1894 as well as a part of section 820 of the civil code of 1859. Both parts, like many other sections of the Organic Act, were copied in that act from the constitution of 1894. Perhaps the rule should be followed that when one state borrows a statute of another state it borrows also the construction put upon it by the latter state, and especially in view of the fact that this section is not merely borrowed by one state for itself from another state, but is a mere continuation of the statute for the latter state itself. Upon the extent to which the Hawaiian law relating to the judi-

ciary has been continued in force by the Organic Act see 5 Ops. Att'y. Gen'l. 539; *Schooner Robert Lewers v. Kekauoha*, 114 Fed. 849; *Carter v. Gear*, 197 U. S. 348; 16 Haw. 242. There is no doubt, as shown by the list of Hawaiian cases set forth above, that this section has not been regarded in the past as exclusive. The question whether it was exclusive has often been suggested by the court, but except in *Love v. Love* and the present case counsel have not seen fit to press the argument, and it has not been acted on. The question being one at least of doubt and the statute having been acted on as not exclusive in so many cases both before and since the enactment of the Organic Act, and this construction being one which is highly desirable and which is in conformity with prevailing sentiment elsewhere, as shown by constitutional and statutory provisions as well as by remarks of courts, it seems to me that we should adhere to it.

There is, it is true, a possibility under this view that in some cases all the members of the court might be disqualified and consequently that such cases could not be heard unless on the theory that a disqualified judge may sit in case of necessity, but that contingency might happen under any other disqualification and would in any event rarely happen. It has not happened, so far as I know, during the fifty-nine years covered by our reports. If it should happen occasionally, that would be incomparably better than the alternative that members of the court should sit in all cases in which they have been of counsel—as they would be required to do under our statute, if it is valid, unless both parties consent to a hearing by less than three judges.

ANNIE KEALOHA AND KEONI WILLIAMS v. WILLIAM R. CASTLE, TRUSTEE.

ERROR TO THE CIRCUIT JUDGE OF THE FIRST CIRCUIT.

SUBMITTED MARCH 12, 1906.

DECIDED MARCH 15, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

Decision in this, ante p. 45, affirmed on error.

OPINION OF THE COURT BY HARTWELL, J.

All the matters presented in the assignment of errors were passed upon by this court, ante p. 45, on the question reserved by the circuit judge, whether the defendant's demurrer should be sustained. The circuit judge having been advised by us that the demurrer ought to be sustained a decree was made by him accordingly, to which the plaintiffs bring this writ of error in order to obtain the final judgment of this court, which is that the decree is affirmed.

Smith & Lewis and *T. M. Harrison* for plaintiffs in error.

Castle & Wilhington and *A. G. M. Robertson* for defendant in error.

JAMES L. HOLT, TAX ASSESSOR, PLAINTIFF, v. A. TULLETT, DEFENDANT; I. I. S. N. CO., LTD., GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED MARCH 8, 1906.

DECIDED MARCH 19, 1906

FREAR, C.J., HARTWELL AND WILDER, JJ.

GARNISHMENT—*seamen's wages cannot be made subject to.*

A seaman's wages cannot be attached or made subject to garnishee process. U. S. R. S., Section 4536.

OPINION OF THE COURT BY WILDER, J.

(Frear, C.J., dissenting.)

Plaintiff secured judgment against defendant in the district court of Honolulu for the sum of \$120.38. Execution on this judgment was returned wholly unsatisfied. Then under Section 2118 of the Revised Laws the garnishee was cited in and ordered to pay plaintiff the sum of \$65 found to be due defendant as wages from the garnishee. From this decision of the district court the garnishee appealed to this court on the point of law that it was and is void because defendant was a seaman within the meaning of Section 4536 of the U. S. Revised Statutes and his wages were not subject to garnishment or arrestment from any court.

Section 4536 of the U. S. Revised Statutes is as follows: "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of any attachment, incumbrance, or arrestment thereon; and no assignment or sale of wages, or of sal

vage, made prior to the accruing thereof, shall bind the party making the same, except such advance securities as are authorized by this Title."

It is claimed by the garnishee and admitted by the plaintiff that defendant is a seaman within the meaning of that section. There being no issue raised as to whether defendant is a seaman within the meaning of that section, and that statute under the Organic Act having the same force and effect in this Territory as elsewhere in the United States, the only question to be decided is whether wages due a seaman may be attached or subjected to garnishee process after a judgment against him.

Plaintiff admits that such wages cannot be attached or subjected to garnishment before judgment, but contends that after judgment the statute does not prevent attachment or garnishment. We fail to see the distinction. There is no question but that this statute was enacted for the protection of seamen: the effect of it is to nail the wages of a seaman to the mast of his ship. And, if a seaman's wages for his own benefit are protected from attachment, what difference does it make to him whether they are attached before or after judgment. In our opinion there is no such distinction as is contended for.

It is desirable for seamen and in the interests of the public that nothing shall obstruct the right of seamen to get their wages. This right the statute protects. See *McCarty v. City of New Bedford*, 4 Fed. 818. The seamen themselves cannot lawfully assign or anticipate their wages. See *The George W. Wells*, 118 Fed. 761.

A judgment against a seaman gives the judgment creditor a right to levy execution on all property of the seaman liable to execution, but under the federal statute the right of a seaman to be paid his wages cannot be attached or arrested by execution or garnishee process. See *McCarty v. City of New Bedford*, supra; *The St. Louis*, 48 Fed. 312.

The cases of *Telles v. Lynde*, 47 Fed. 912, and *In re The Queen*, 93 Fed. 834, are relied on by plaintiff. If these cases hold, as claimed, that wages due a seaman may be seized under an execution issued on a valid judgment in a state court, they

are not good law, because the wages (that is, the right to the wages,) were attached and arrested whether called by garnishment, trustee process, foreign attachment, proceedings supplemental to execution or execution itself. The contention claimed for is also opposed to the views, or the logical deduction therefrom, of Judges Benedict (4 Fed. 818), Nelson (14 Fed. 858), Brown (20 Fed. 57) and Lowell (17 Fed. 627, 703). And what is more, it is opposed to the plain and ordinary meaning of the words of the statute.

The decision of the district magistrate is reversed and the order of attachment is dismissed.

M. F. Prosser, Deputy Attorney General, (E. C. Peters, Attorney General, with him on the brief), for plaintiff.

Smith & Lewis for the garnishee.

CONCURRING OPINION OF HARTWELL, J.

In *Simerson v. I. I. S. Nav. Co.*, 1 Dole 189, the court mentions the cases in which U. S. District Judge Morrow, 47 Fed. 912, and U. S. District Judge De Haven, 93 Fed. 834, decided that the statute does not exempt seamen's wages from execution, but does not decide the question arising in this case. Those decisions may be controlled by provisions in the California statute or by considerations of comity for the judgments of a state court which had been made in those cases.

The act entitled "To Consolidate and Amend the Law Relating to the Garnishee Process to Facilitate the Collection of Debts," Ch. 35, Laws 1876 (Ch. 135, R. L.), provides: "Whenever the goods or effects of a debtor are concealed in the hands of his attorney, agent, factor or trustee so that they cannot be found to be attached or levied upon, or when debts are due from any such person to a debtor," the goods and effects and debt "shall be secured" to pay such judgment as the plaintiff shall recover and after judgment, "shall be liable to pay the same." The plaintiff, "on praying out execution, may direct the officer serving the same to make demand of such agent, attorney, factor or trustee of the goods and effects of the defendant in his

hands, whose duty it shall be to expose the same to be taken on the execution, also to make demand of such debtor for any debt or such part thereof as shall satisfy such judgment as may be due to the defendant, and it shall be the duty of such debtor to pay the same," and after judgment the judge may order that such debts "be attached to answer the judgment debt" and "may order execution to issue to levy the amount due." The statute, it will be seen, treats the debt as "attached" whether before or after judgment.

The federal statute, enacting that seamen's wages shall not be subject to attachment, does not except attachments after judgment, and the court has no authority to make the exception. I therefore concur.

DISSENTING OPINION OF FREAR, C.J.

The plaintiff recovered judgment against the defendant, the captain of a steamer, for taxes. Execution was issued and returned unsatisfied. The plaintiff then instituted what are usually called proceedings supplemental to execution, by citing in the owner of the steamer, a corporation, for the purpose of having the wages due and unpaid by it to the captain applied to the judgment under R. L., Sec. 2118. The defense of the owner is that the wages of the captain are exempt from execution and proceedings supplemental to execution as well as from ordinary attachment and garnishment under the federal statute (R. S., Sec. 4536) which provides that "no wages due or unpaid to any seaman or apprentice shall be subject to attachment or arrestment from any court," and that if it (the owner) should be required to apply the wages to the judgment, the captain could nevertheless recover such wages from it in an action in admiralty in the federal court, and thus it would be required to pay twice. It seems to me that the language of the statute, the reason of the statute and the cases that construe it are all against this contention. I assume for the purposes of this case that the captain is a seaman within the meaning of the statute.

1. The statute in its language exempts wages from "attachment and arrestment." Arrestment, I understand, is merely

a Scotch term for attachment. Attachment, of course, includes garnishment, which is merely the term for an attachment of property or debts in the hands of a third person. Attachment in a broad sense would, of course, include almost any seizure of person or property under judicial process, including a seizure on execution, but in its ordinary and proper sense it refers to mesne rather than final process. In 4 Cyc. 395, the first note under the article on attachment contains the following: "Distinguished from Execution.—An attachment has but few of the attributes of an execution, execution being a judicial process for obtaining debt or damages recovered by judgment, and final in its character, while the attachment is but mesne process, liable at any time to be dissolved and the judgment upon which may or may not affect the property seized." Waples on Attachment, Sec. 1, says: "Attachment, as generally authorized, * * * is a remedy for the collection of ordinary debt by preliminary levy upon property of the debtor to conserve it for eventual execution after the lien shall have been perfected by judgment. * * * Garnishment is attachment in the hands of a third person, * * * the creation of an inchoate lien to be perfected by judgment; the conservation of the debtor's property to secure the payment of the debt." The proceeding now in question, though sometimes called attachment or garnishment, is usually referred to as a proceeding supplemental to execution. It is treated under that title as a branch of the law of executions, not as a branch of the law of attachments, in the text books and cyclopaedias. The fullest treatment is found in 17 Cyc. 1402 et seq. Our statute on the subject, beginning with R. L., Sec. 2117, although included in the chapter on garnishment, was not a part of the original act of garnishment passed in 1856 although included in the later consolidated act of 1876 on that subject. It was copied from the English statute and is found, with various modifications, in the statutes of many of the American states. The proceeding is not brought for the purpose of tying up or holding the debt or property in the hands of the third person to await the result of an action against the defendant which may result favorably

or unfavorably to him, but is brought only after judgment is obtained against the defendant and execution has issued and been returned unsatisfied. Its object is to apply the property or debt immediately to the satisfaction of the judgment or expose it for sale immediately by the sheriff on execution. If the existence or validity of the debt is disputed or is doubtful the proceeding is usually dismissed immediately and the parties are left to their ordinary legal remedies, because the court at that stage, in the absence of statutory provision, has no power to try the question. The proceeding is a substitute for a creditor's bill. It is in the nature of execution. The words in the federal statute should be construed in their ordinary sense. If exemption from execution as well as from attachment had been intended the words ordinarily used to express such an intention would have been used. The rest of the section, which is quoted in Mr. Justice Wilder's opinion, bears out this view. While it is true that the word "attach" is sometimes used in reference to executions just as the word "levy" is sometimes used in reference to attachments, the real distinction between attachments and executions should not be lost sight of through a mere confusion of words.

2. The reason of the statute is found in the improvident character of seamen and the peculiar circumstances under which they are placed and the consequent need of their protection. To permit a retention of their wages pending a suit of uncertain duration and result would often work a great hardship upon them, but to allow their wages to be applied in payment of a just debt conclusively determined by a judgment would not be a hardship in a legal sense. The object of the statute is to prevent a suspension of wages by attachment or garnishment pending an action that may turn out to be unfounded, and not to prevent their application on execution to the payment of a just debt. In a certain sense a payment of a seaman's just debt would be a payment to him. It would be a payment on his account.

3. As to the cases, reference will be made first to the one most relied on by the majority, *McCarty v. The City of New*

Bedford, 4 Fed. 818, in which it was said that the federal statute now in question, which was copied from an English statute, was merely declaratory of the general maritime law and that therefore even in the absence of such a statute a state court was absolutely without jurisdiction to attach a seaman's wages. Even if that were good law it would have no application to the present case because that was a case of ordinary attachment or garnishment and not of execution or a proceeding supplemental to execution. Apparently, however, it was not good law. See the elaborate opinion by Chief Justice Gray in *Eddy v. O'Hara*, 132 Mass. 56, and the later decision in *White v. Dunn*, 134 Mass. 271. The result of these cases and the later federal cases, namely, *Ross v. Bourne*, 14 Fed. 858; 17 Fed. 703; *The City of New Bedford*, 20 Fed. 57, was that, in the absence of statute, a seaman's wages could be reached by ordinary attachment or garnishment proceedings in a state court, but that prior to their actual payment under such proceedings, an action could be prosecuted by the seaman for his wages in a federal court, that is, the federal court would not require the seaman to wait until the termination of the proceedings in the state court, but whenever payment was actually made under the process of either the state or the federal court the other court would dismiss the proceedings before it and not compel the party from whom the wages were due to pay a second time. All these cases were decided when the statute now in question was not applicable and related to ordinary attachment or garnishment on mesne process and not to execution or proceedings supplemental thereto. Even under the statute when it was made applicable a federal court under certain circumstances would not compel a party to pay a second time after payment under state process. *The St. Louis*, 48 Fed. 312. I have no doubt, however, that under the statute a state or territorial court should not attach the wages under mesne process. Thus there are no cases against my view. On the contrary the following cases support it.

In *Telles v. Lynde*, 47 Fed. 912, the court said, referring to the federal statute now relied on, "The section provides that 'no

wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment.' The libellant's wages were not taken from the respondents under attachment or arrestment, but under execution, and the proceedings supplementary thereto. The law does not exempt seamen's wages from such process, and the court therefore had jurisdiction to make the appropriation it did in satisfaction of the judgment against libellant." The court referred to was a justice's court in San Francisco corresponding to our magistrate's court and the proceedings supplementary to execution referred to were under a statute of the same character as ours. In *The Queen*, 93 Fed. 834, in which also proceedings in a San Francisco justice's court were involved, the court said: "The claim of the libellant is that the wages of seamen are exempt from execution under the general rule of the maritime law, and also by the express provisions of section 4536 of the Revised Statutes of the United States," and after referring to the general maritime law on this subject and the hardships of seamen on which it is founded, continued: "There is, however, a marked difference between an attachment to secure the payment of an asserted, and, it may be, disputed and unfounded, claim, and the levy of an execution which simply seizes upon property of a debtor for the purpose of satisfying a valid judgment; and my attention has not been called to any case in which it has been decided that the wages of a seaman may not be taken on execution issued out of a state court, in the absence of a statute exempting them from such seizure, or in which it has been held that a prior payment of the amount due a seaman for wages, in satisfaction of an execution issued against him, would not constitute a good defense to a subsequent action brought by him in admiralty for the recovery of such wages. In such a case it cannot be said that the seaman has not had the full benefit of the wages earned by him. Their application, under a lawful execution, to the payment of a debt of his, which is conclusively presumed to be just, and which he is bound, in conscience, to pay, is not oppressive, in a legal sense; and a court of admiralty will not, under such circumstances, decree that what has already been paid for

his benefit shall be again paid to him. In regard to the second contention of libellant, nothing more need be said than that section 4536 of the Revised Statutes, in providing, as it does, that 'no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court,' is not broad enough to cover the case of a seizure of a seaman's wages on execution (*Telles v. Lynde*, 47 Fed. 912), and therefore has no application to the present case." In *Simerson v. I. I. S. Nav. Co.*, 1 Dole 181, it is said that, "The cases of *Telles v. Lynde*, 47 Fed. Rep. 912, and *The Queen*, 93 Fed. Rep. 834, decide that the law in question, Section 4536 of the Revised Statutes, does not exempt seamen's wages from an execution." I fully agree with the conclusions of these federal courts. Even if my own impression were the other way, I should feel that, in the absence of any decision to the contrary, I ought to follow the construction placed by three federal courts in this, the ninth circuit, on a federal statute, especially when the question is at least a doubtful one and that construction is favorable to our own jurisdiction and to the rights of our own Territory and people. In *The City of New Bedford*, supra, even the federal court in one circuit followed the decision in *Ross v. Bourne*, supra, by the federal court of another circuit in a case originating in the latter notwithstanding the earlier contrary decision in *McCarty v. The City of New Bedford*, supra, by a federal court in the former circuit.

Thus, from whatever point it is viewed, the statute in question has no application to the present case and accordingly the judgment of the district magistrate should be affirmed.

IN RE ASSESSMENT OF TAXES, ELIZA S. WILDER.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION

DIVISION.

SUBMITTED MARCH 15, 1906. DECIDED MARCH 19, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TAX APPEAL—*burden on appellant.*

A valuation made by the tax appeal court is sustained, the evidence not showing that it was erroneous.

OPINION OF THE COURT BY FREAR, C.J.

The question is solely one of valuation of a residence lot, exclusive of improvements, having a frontage of 400 feet on each of the parallel streets Pensacola and Piikoi in Honolulu, and a depth of 600 feet from street to street. The taxpayer returned it at \$20,000, the assessor assessed it at \$30,000 and the tax appeal court on the taxpayer's appeal placed the value at \$24,000, from which valuation the assessor now appeals.

The lot slopes down from Pensacola street towards Piikoi street. It was assessed at \$35,000 the year before, but on appeal the tax appeal court reduced the valuation to \$30,000. Five experts testified, placing the valuation at amounts ranging from \$19,200 to about \$30,000. The assessor also testified that the land was worth \$30,000. It was shown also that certain lots of smaller area and different shapes and surroundings in that general section of the city had been sold, returned or assessed at higher prices per square foot.

The burden is on the appellant to show that the decision of the tax appeal court was erroneous. There might well be considerable difference of opinion as to the value of this lot. The tax appeal court, consisting of three men who had had much to do with real estate values, placed the valuation at \$24,000

after hearing the evidence. We cannot say on the evidence that that valuation was erroneous, and accordingly it is affirmed.

M. F. Prosser, Deputy Attorney General, and E. C. Peters, Attorney General, on the assessor's brief.

Thompson & Clemons on the taxpayer's brief.

J. D. PARIS, MRS. E. ROY, W. H. JOHNSON, J. D. JOHNSON AND W. H. SHIPMAN *v.* M. F. SCOTT.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

SUBMITTED MARCH 19, 1906. DECIDED MARCH 21, 1906.

FREAR, C.J., HARTWELL AND WILDER, J.J.

EXCEPTIONS.

Certain exceptions plainly without merit are overruled without comment.

DISTRICT COURTS—*jurisdiction.*

District courts have jurisdiction in actions of trespass quare clausum fregit unless the title to real estate is in question.

OPINION OF THE COURT BY WILDER, J.

Plaintiffs are the owners of a piece of land in Kona, Hawaii, which on July 19, 1898, they leased for twenty years to one Chikura. After a number of assignments of the lease it got into the hands of defendant some time in February, 1905. On March 15, 1904, and before the assignment to defendant the lessors re-entered the demised premises and canceled and forfeited the lease for failure to pay rent and perform all the covenants. At various times between April 21, 1905, and August 30, 1905, defendant committed various acts of alleged trespass on the land, for which plaintiffs brought an action of trespass quare clausum fregit in the district court of North Kona, Hawaii, alleging damages in the sum of \$299. It does not appear what defense was made in the district court. Judgment having been rendered for plaintiffs in the district court, defendant appealed to the circuit court, where he filed an

answer admitting the acts complained of but justifying and defending such acts, not, however, stating his ground of justification. The case went to a jury, which found for the plaintiffs in the sum of \$299.

After motions to dismiss the case on the ground that the district court had no jurisdiction and for a new trial in the circuit court, neither of which motions was incorporated in the bill of exceptions, had been overruled, defendant comes to this court on six exceptions, only five of which were allowed by the circuit judge. These five exceptions may be summarized as follows: (1) to the admissibility of a copy of a notice of re-entry and cancelation and forfeiture of the lease, on the ground that it was an unsworn declaration not made in the presence of the lessee and therefore hearsay; (2) to the allowing of a question asked J. D. Paris, one of the plaintiffs, as to whether at the time of entry there was any rent due and unpaid, on the ground that it was incompetent, irrelevant and immaterial, it not appearing, however, that the question was answered; (3) to the refusal to grant a motion for a nonsuit; (4) to the denial of a motion for a new trial; and (5) to the denial of a motion to dismiss the case, on the ground that the evidence revealed an action involving title to real estate.

The first four exceptions are so obviously without merit that they are overruled without comment.

The last exception is based on the ground that the evidence in the circuit court showed that this was an action involving title to real estate and that consequently the district court had no jurisdiction. It is not shown that that appeared in the district court, and it also does not appear what was the defense made in that court. District courts have jurisdiction to try actions of trespass quare clausum fregit unless the title to real estate is in question. See *In re Kameeui*, 6 Haw. 542. In this case it did not so appear. It follows that this exception must be overruled.

The exceptions are overruled.

Smith & Lewis, L. J. Warren and G. F. Maydwell for plaintiffs.

Defendant in person.

EX PARTE HIGASHI.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 28, 1906.

DECIDED APRIL 6, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

JUDGE—disqualification.

A justice of this court is not disqualified from sitting in a case which requires consideration of an act of which he expressed approval to a member of the judiciary committee of the legislature when the bill was before it.

STATUTE—partial repeal.

Act 59 of the Laws of 1905, which provides that infamous punishment shall not be imposed on persons convicted of misdemeanors, repeals that portion of Sec. 3179, R. L., authorizing hard labor in the sentence of imprisonment but does not repeal that portion which authorizes imprisonment.

INDICTMENT—infamous punishment—fifth amendment—confinement in Honolulu jail.

A sentence to imprisonment for a misdemeanor does not become infamous punishment requiring an indictment under the fifth amendment by reason of the convicted person being confined in Honolulu jail.

Id.—trial by jury—sixth amendment—waiver of jury.

Under the sixth amendment a misdemeanor for which imprisonment may be imposed for as long a term as one year requires a trial by jury although it does not require an indictment as for an infamous offense; but the right to a trial by jury in the first instance is waived under Sec. 1664, R. L., by a defendant not demanding a jury when brought before a magistrate for trial but submitting to the jurisdiction of the magistrate. The act authorizing trial by the magistrate in a case like this, provided the defendant does not demand a jury, is constitutional.

OPINION OF THE COURT BY HARTWELL, J.

The appellee, who was a petitioner for a writ of habeas corpus, claims that the chief justice is disqualified because he

expressed to a member of the judiciary committee of the legislature his approval of the bill which became Act 59, Laws of 1905, it being material to decide whether the act, in providing that no person upon conviction of a misdemeanor shall be imprisoned in Oahu prison or subjected to any infamous punishment, amends Sec. 3179, R. L., authorizing imprisonment at hard labor not exceeding one year. It is claimed that approval of the bill is like the former relation of attorney and client, which, as held in the *Notley* will case, ante, p. 393, is not a disqualification, but the petitioner was allowed to argue that the decision was wrong. It is urged that the court having for many years construed the article in the Constitution which enumerates causes of disqualification as not exclusive of the case of a judge who had been of counsel, Congress intended that this construction should be placed upon the same provision in the Organic Act. It is further contended that the common law, which does not disqualify a judge except for pecuniary interest, is not law in Hawaii because contrary to Hawaiian judicial precedents; and that as absence of bias is essential to judicial impartiality its presence disqualifies a judge from performing judicial functions; that the enumerated causes of disqualification by pecuniary interest, relationship and former judgment are founded on bias, but do not include all instances, and that the law ought to be so construed as to secure the object intended.

It is obvious that if the alleged disqualification is based upon a principle of law—that bias per se disqualifies—it is immaterial from what circumstances it arises or what construction has been placed upon constitutional provisions.

The petitioner cites the *Mankichi* case, 190 U. S. 197, and *Carter v. Gear*, 197 U. S. 348, as authority that “in interpreting a statute * * * the intention of the law making power will prevail, even against the letter of the statute.” As the Joint Resolution of Annexation contained no express provision for extending the Constitution of the United States to Hawaii or declaring that no Hawaiian laws inconsistent with the Constitution should remain in force, the court declined to read into the resolution such unexpressed provision. In the other case

the court found in Sec. 81 of the Organic Act "authority for a recognition of the laws previously existing in Hawaii concerning the constitution of its court and their method of procedure." The cases do not support the appellee's contention. A law which is clear and unambiguous and the application of which in its literal terms results in no peculiar hardship or in absurdity, requires no construction or interpretation. All that the court can do in such cases is to declare the law to be as it is without undertaking to modify its terms.

The substance of the contention is (1) that the Organic Act, in naming certain causes which disqualify a judge, does not name all of them; (2) that the requirement of the Organic Act that the supreme court shall consist of a chief justice and two associate justices, with the proviso that the place of an absent or disqualified justice may be filled as provided by law, namely, by a circuit judge, does not refer solely to disqualifications named in the act, but to such other causes of disqualification as the court may deem to be sufficient; (3) that the uniform decisions of this court that a judge is disqualified who has been of counsel in the case must be treated as if the disqualification were expressly declared in the Organic Act, and (4) that bias, being generally a cause of disqualification by constitutional or statutory provisions in the several states, can, in the absence of such provisions in the Organic Act or constitutions of Hawaii, be regarded by this court as a sufficient disqualification. We see no sufficient reason to sustain the contention.

To hold that bias is a cause of disqualification, under certain circumstances, would require the same ruling under all circumstances and whether the bias would be likely to influence the judgment or not. This would be judicial legislation. The fact that bias, existing in various specified relations, or generally, has elsewhere been made the subject of legislation, indicates that legislation was considered to be necessary. We hold that the chief justice is not disqualified.

This case is an appeal by the Territory from an order of the circuit judge, in a habeas corpus proceeding, discharging the petitioner who was imprisoned in Honolulu jail under a

sentence of thirty days' imprisonment imposed by the district magistrate of Honolulu for the offense of "aiding and assisting in maintaining a lottery contrary to Section 3173 R. L." The petition for the writ of habeas corpus alleges that this sentence of imprisonment without hard labor was unauthorized by law and the conviction by the magistrate was in violation of the third article of the Constitution providing that "The trial of all crimes, except in cases of impeachment, shall be by jury;" and of the requirement of the fifth amendment that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury," and of the sixth amendment that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury."

The petition further alleges that the petitioner was imprisoned by the high sheriff in "what is arbitrarily designated by law as Honolulu Jail, but which your petitioner avers is in fact a part of Oahu Jail, the latter being the Territorial penitentiary in which are confined all manner of felons convicted of infamous crimes under the laws of said Territory, including persons under sentence of death, that that portion of said penitentiary designated as Honolulu Jail is under the control of said High Sheriff, who is also the keeper or warden of said penitentiary, that the only means of ingress and egress to said Honolulu Jail so called, is through the gates, office and yard of said penitentiary, and that all persons confined in said Honolulu Jail so called, including your petitioner, are and must be imprisoned in said penitentiary before being confined in said Honolulu Jail so called, and are while so imprisoned in said penitentiary, photographed and registered upon the books of said penitentiary as inmates thereof, that is to say, there is entered upon the journal of said penitentiary, the sex, age, height, personal description of each prisoner thereafter confined in Honolulu Jail, so called, together with his last place of abode and place of nativity and the date of reception and discharge of each such prisoner, that all persons confined in said Honolulu Jail so called are numbered sequentially with felons

under sentence for infamous offenses and imprisoned in said penitentiary, that all persons confined in said Honolulu Jail so called, are, without exception, stripped of their citizen apparel and are compelled to don and wear a conspicuous prison garb, that the food served to the inmates of said Honolulu Jail so called is coarse and meagre, being the same in kind and quantity that is served to the felons in said penitentiary, being prepared by the felons in said penitentiary and served from the same kitchen in said penitentiary, that the sick inmates of said Honolulu Jail so called are confined in the hospital in said penitentiary together with the sick and disabled felons in said penitentiary, and are attended and served by the same persons, to wit, persons under sentence in said penitentiary for infamous crimes, that the only difference between the treatment accorded the felons imprisoned in said penitentiary proper, and the persons imprisoned in that portion of said penitentiary arbitrarily designated as Honolulu Jail, is that said felons are required to perform hard labor while the persons imprisoned in said Honolulu Jail so called, are not required so to do." Also it is further alleged "that the classification or designation of a part of said penitentiary as Honolulu Jail, is wholly arbitrary and unreasonable and is a mere pretense or subterfuge, the persons alleged to be confined in Honolulu Jail so called, including your petitioner, being in fact confined in the said penitentiary, the same being the Territorial prison in which the death sentence is executed, and in which felons under sentence for infamous crimes are confined as aforesaid, and that the punishment inflicted upon your petitioner in the premises is an infamous punishment and renders the crime with which he was charged and whereof he was convicted by said District Magistrate an 'infamous crime' within the meaning of the Fifth Amendment to the Constitution of the United States."

In argument the petitioner presented, as a further reason why his conviction was unlawful, that by the Organic Act, Sec. 83, "No person shall be convicted in any criminal case except by unanimous verdict of the jury."

The high sheriff's return to the writ "admits that the way of ingress and egress to said Honolulu Jail is through the office and yard of the Oahu Jail, but denies that said petitioner, or any person not convicted of a felony, is confined in said Oahu Jail or any part thereof"; "admits that persons sentenced to imprisonment for a period of more than six months are photographed for the purpose of identifying them, and the names and descriptions of all persons confined in either Oahu Jail or Honolulu Jail are registered in record books kept for that purpose in the office which is common to both jails, in which office such records are kept by persons employed by respondent for that purpose"; "shows that said Honolulu Jail is in no sense a part of Oahu Jail or the Territorial Penitentiary; that it is separated therefrom by a high wall, and the building in which persons are there confined is separate and distinct from the buildings of the Oahu Jail or Territorial Penitentiary and far removed therefrom; that the inmates thereof are not permitted or allowed to mingle with persons confined in said Oahu Jail or Territorial Penitentiary, and that it appears by such record books as are kept in said office hereinbefore referred to, that the persons confined in said Honolulu Jail have been convicted of misdemeanors"; "admits that persons confined in said Honolulu Jail are compelled to wear a common uniform of blue denim, but that said uniform is plain and inconspicuous, and persons confined in said Honolulu Jail are not compelled to wear the same in public or do hard labor or labor of any kind in public dressed therein. That the food served to said prisoners confined in said Honolulu Jail is of good quality and in sufficient quantity, and is constantly inspected by the prison physician," and "that there is a hospital used in connection with said jail, where for the convenience of the prison physician and the proper care of said prisoners, all sick are permitted to be taken and treated, but that petitioner is not an inmate thereof or confined therein, and cannot be and has not been compelled to go thereto," but "denies that the only difference in the treatment accorded felons imprisoned in the penitentiary proper and the prisoners imprisoned in the Honolulu Jail is that said

felons are required to perform hard labor, while the prisoners confined in the Honolulu Jail, so called, are not required so to do, alleging in this behalf that the two jails are separate and apart, that the prisoners therein confined are kept separate and apart, that the prison dress required is different, that felons are required to undergo infamous punishment, to wit, hard labor in public in striped uniform prescribed by prison rules, while those confined in the Honolulu Jail cannot be compelled to do or perform hard labor of any kind or description, in public or otherwise, in prison uniform or otherwise"; "that the classification or designation of a part of said penitentiary as Honolulu Jail is wholly arbitrary and unreasonable, and a mere pretense and subterfuge, alleging in this regard that the said jail, as hereinbefore set forth, was established by law for the purpose of confining therein persons convicted of misdemeanors, and no others," also "that the petitioner was confined in said penitentiary, or the Oahu Jail, or that in the Honolulu Jail, where said petitioner was confined, the death sentence is ever executed, or that felons are confined therein, or that the punishment inflicted on said petitioner is an infamous one."

To this return the petitioner filed a "traverse affidavit." A stipulation was filed that the evidence in this case should be the same as that taken and filed in the case of Chun Hoon on habeas corpus.

The material facts in the case appear to us to be as set forth in the return of the high sheriff. The Honolulu jail and Oahu prison are distinguished from each other by the statute which restricts the confinement of persons convicted of misdemeanors to the former, and the confinement of persons convicted of felony to the latter. Acts 58 and 59, Laws of 1905.

The circuit judge, in discharging the petitioner, ruled as follows: "In my opinion Section 3179 of the Revised Laws has not been amended or modified, but is in full force and effect. That being true, and the punishment therein prescribed, which may be imposed, being infamous in its nature, it follows that the judgment of conviction by the District Magistrate was and is void: First, because the statute does not permit a sen-

tence of imprisonment without hard labor (Territory vs. Savage, 14 Haw. 286); and, Second, because, under the Constitution of the United States in criminal offenses of this character, there must be a presentment or indictment of a grand jury in a court of competent jurisdiction."

We will first consider whether the petitioner was liable to infamous punishment by reason of his confinement in Honolulu jail.

By statute, Sec. 2702, R. L., "Every offense, not a felony, is a misdemeanor," a felony being defined "an offense that is punishable with death or with imprisonment for a longer period than one year." Act 58, Laws of 1905, after declaring in Sec. 1, "That the building now known as the new prison erected in Iwilei, Honolulu, in the year 1904 on the Ewa side of the building known as the Oahu Prison, shall hereafter be known as the Honolulu Jail," enacts, Sec. 2: "That no person convicted of a felony or suffering infamous punishment shall be sentenced to be confined or shall be confined within said Honolulu Jail so designated. No person confined therein shall be subject or compelled to perform labor during the term of his imprisonment." By Act 59, "No person committed or held for trial or to secure his attendance as a witness or upon civil process or for contempt or upon conviction of a misdemeanor or otherwise by authority of law, except upon conviction of a felony, shall be imprisoned in Oahu Prison or subjected to any infamous punishment."

Hence, it follows that if the statute does not authorize imprisonment at hard labor as a punishment for a misdemeanor, no person convicted of a misdemeanor can lawfully be subjected to any infamous punishment unless such punishment necessarily results from confinement in the Honolulu jail under the conditions existing there, with particular reference to the proximity of convicted felons.

In *Mackin & Another v. U. S.*, 117 U. S. 348, the court held "That at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of

the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress. In most of the States and Territories, by constitution or statute, all crimes, or at least statutory crimes, not capital, are classed as felonies or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the State prison or penitentiary." In that case the defendants were charged with a conspiracy to defraud the United States by breaking open a package containing a return in an election for choice of a representative to Congress, altering the certificate of the result of election, the poll book and tally list of votes for each candidate and a large number of the ballots and substituting spurious papers in their stead in violation of certain acts of Congress. Upon their conviction by a jury they had been sentenced to a fine of \$5000 each and to be imprisoned for two years in the penitentiary of the State of Illinois. The court said that by the U. S. Revised Statutes, Secs. 5541, 5542, 5539, "a sentence 'to imprisonment for a period longer than one year,' may be ordered to be executed in a State prison or penitentiary; and the convict, while thus imprisoned, is 'subject to the same discipline and treatment as convicts sentenced by courts of the State.' "

The prisoner in this case was expressly exempt from the discipline and treatment imposed upon convicted felons. Acts 58 and 59 contemplate the complete separation of Oahu prison from Honolulu jail, and complete separation and treatment of convicted felons and persons convicted of misdemeanors. Undoubtedly imprisonment of a person convicted of a misdemeanor with convicted felons would create an impression that he belonged to the felon class whether treated as they were or not, since compulsory association of itself degrades, but we think that under the statutes which are applicable to this case, and under the conditions shown to exist, the petitioner is not undergoing infamous punishment and is not liable to be subjected to it if the statute has been amended so as to dispense with the penalty of hard labor when imprisonment is imposed.

What then is the effect of Act 59? It is contended by the petitioner that it prohibits the high sheriff from inflicting the

punishment of hard labor upon persons convicted of misdemeanors and sentenced to imprisonment at hard labor, or else that it repeals the entire clause, "or imprisonment at hard labor not exceeding one year" and not merely the words "at hard labor," and that this must be so because a sentence of imprisonment at hard labor is indivisible, a sentence of imprisonment only, when the law authorizes imprisonment at hard labor, being invalid as shown in cases like *In re Cooper*, 3 Haw. 20.

It is true that such a sentence is indivisible into two separate sentences of imprisonment and of hard labor. It is equally true that the statute can be amended by repealing that portion of it which includes hard labor. The only question is whether Act 59 does, to that extent only, repeal the portion of Sec. 3179 which authorizes imprisonment at hard labor. We do not doubt the meaning and effect of this act, but if this were uncertain "One of the most effectual ways of discovering the true meaning of the law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it." Sec. 12, R. L.

There was no reason for limiting the power of the sheriff to impose infamous punishment for he had no such power. There is no reason to suppose that the legislature meant to abolish all imprisonment in cases of misdemeanor, but there is every reason to suppose that they did not intend to leave the community at the mercy of the criminal or vicious class in all cases of misdemeanors in which the statute does not explicitly authorize imprisonment only. It would also be absurd to suppose that the legislature meant to prohibit the sheriff from carrying into effect sentences authorized by law. "When the words of a law are ambiguous, every construction which leads to an absurdity should be rejected." Sec. 13, R. L.

On the other hand, it was generally understood that the laws authorizing sentences of imprisonment at hard labor for offenses intended to be prosecuted upon information must be amended.

Another rule which applies is that "Laws in pari materia, or upon the same subject matter, must be construed with refer-

ence to each other; what is clear in one statute may be called in aid to explain what is doubtful in another." Sec. 11, R. L.

To hold that the act takes away power to sentence to imprisonment persons convicted of misdemeanors would make unnecessary the provisions that no person upon conviction of a misdemeanor shall be imprisoned in Oahu prison and that no person confined in Honolulu jail shall be subject to perform labor, or that no person convicted of a felony or suffering infamous punishment shall be sentenced to be confined in Honolulu jail.

The only meaning that can be given to Acts 58 and 59 is that persons sentenced for misdemeanors shall not be confined in Oahu prison or subjected by sentence of court to hard labor and that no person convicted of felony shall be confined in Honolulu jail. It is immaterial whether the law says that a penalty for a misdemeanor shall be imprisonment or that wherever imprisonment at hard labor was a penalty hard labor shall no longer be imposed as part of the penalty. "Laws may be repealed either entirely or partially by other laws." Sec. 19, R. L.

The act cannot be disregarded. It must be given effect and there is no other which it can have than to limit the power of a judge to imposing a sentence of imprisonment.. Act 59 and Sec. 3179 can stand together in no other way.

"The repeal of a law is either express or implied; it is express when it is literally declared by a subsequent law; it is implied when the new law contains provisions contrary to, or irreconcilable with, those of the former law." Sec. 21, R. L.

This is not an instance of applying the rule that implied repeals of laws are not considered favorably or that doubtful criminal statutes shall be construed in favor of the liberty of the person. It is hardly a case which requires more than to declare the law.

Although we hold that in this case an indictment was not required by the fifth amendment it remains to consider whether the offense is such as to require a jury trial under Art. 3 of the Constitution, or the sixth amendment, or the provision cited

from Sec. 83 of the Organic Act. In looking at the previous provisions of the section it will be seen that it continues in force the laws of Hawaii relative to the judicial department including civil and criminal procedure, "except as amended by this act"; repeals the laws "which require juries to be composed of aliens or foreigners only"; enacts that jurors shall be male citizens of the United States 21 years of age who can understandingly speak and write the English language, after which provisions come the words, "No person shall be convicted in any criminal case except by unanimous verdict of a jury," which are followed by the provision, "No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race." The section finally authorizes the drawing of grand juries as provided by Hawaiian statutes for petit juries and that circuit courts in like manner may subpoena witnesses for grand juries.

"Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning." Sec. 10, R. L.

It is clear from the context that the act does not require that no person shall be tried for any criminal offense except by a jury, but that in all criminal trials by a jury an unanimous verdict shall be necessary for conviction.

As to constitutional guaranties of a jury trial of all crimes and of the right to a speedy and public trial by an impartial jury in all criminal prosecutions, they do not refer to petty offenses or violations of ordinary municipal ordinances or to such offenses as at common law are summarily tried by a justice of the peace. *Callan v. Wilson*, 127 U. S. 540.

Under similar provisions of state constitutions the summary jurisdiction of magistrates is sustained "in the trial of violations of the usual municipal police regulations, enacted to preserve the peace, good order, health, safety, convenience and comfort of the inhabitants of the local community, and has been expressly held to include infractions of ordinances forbid-

ding disorderly conduct, disturbing the peace, molesting religious societies, profane swearing, public drunkenness, 'riotous' conduct, corner lounging, carrying concealed weapons, assault and battery, petit larceny, (if not a felony), selling lottery tickets, keeping gambling house, nuisance, obstructing sidewalk or harbor, dogs running at large, violating Sunday regulations, selling watered or adulterated milk, violating market regulations, resisting an officer, lewd women on street, keeping bawdy house, vagrancy, vagrancy and disorderly conduct, under habitual criminal act, professional thieves, pickpockets, etc., in and about Central railroad station in Philadelphia, selling intoxicating liquor and selling liquor on Sunday." Sec. 329, McQuillin, Mun. Ord.

The expense and delays of grand jury investigations of such cases and of jury trials, with the failure and miscarriage of justice frequently resulting would be unreasonable and, as shown by the case above cited and the cases which it cites with approval, neither common justice nor common sense, as exemplified in the U. S. Constitution, requires such results.

As said by Mr. Justice Holmes in *Kepner v. U. S.*, 195 U. S. 134, "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."

The offense of gambling, whether prohibited by municipal ordinances or territorial statute, is not a crime which from its nature requires the publicity of a jury trial but when it may be punished, as in the present case, by imprisonment for a period as long as one year, the offense becomes sufficiently grave by reason of the penalty to require a jury trial, if demanded by the defendant. In *Rasmussen v. U. S.*, 197 U. S. 516, the plaintiff in error had been indicted for violating Sec. 127 of the Alaska Code prohibiting the keeping of a disreputable house, the penalty for which was a fine not less than \$100 nor more than \$500 or imprisonment not less than three months nor more than one year. The Alaska Code, adopted by Congress, provided that in trials for misdemeanors six persons should constitute a legal jury. It was held that this provision of the act of Congress

“was repugnant to the sixth amendment of the Constitution of the United States.”

The decision is conclusive in the present case in requiring us to hold that under the sixth amendment the petitioner was entitled to “enjoy the right to a speedy and public trial by an impartial jury.”

Schick v. U. S., 195 U. S. 65, a case of a statutory offense involving a penalty of \$50, held: “When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy,” and that a jury could be waived in that case. In *Capital Traction Co. v. Hof*, 174 U. S. 1, it was held that the right of a jury trial in common law suits secured by the seventh amendment was not infringed by an act of Congress giving jurisdiction to justices of the peace of the District of Columbia for the trial of civil causes to \$300, with a right of appeal to a jury trial in a court of record on giving security to pay the judgment of the appellate court. The present case comes within the provisions of Sec. 1664, R. L., giving to district magistrates certain criminal jurisdiction, with the proviso that if the accused in any such case “shall have the right to a trial by jury in the first instance, the district magistrate, upon demand by the accused for such trial by jury, shall not exercise jurisdiction over such case, but shall examine and discharge or commit for trial the accused as provided by law, but if in any such case the accused shall not demand a trial by jury in the first instance, the district magistrate may exercise jurisdiction over the same subject to the right of appeal as provided by law.” The petitioner, not having demanded the trial by jury to which he was entitled, submitted his case to the jurisdiction of the magistrate, thereby waiving a jury. *Phillips v. Preston*, 5 How. 290; *Kearney v. Case*, 12 Wall. 284; *Perego v. Dodge*, 163 U. S. 166. In *Schick v. U. S.*, supra, Mr. Justice Harlan in his dissenting opinion maintained that a jury can be waived in no misdemeanors other than “petty or minor crimes which at common law can be tried without a jury,” adding: “An enumeration of all the crimes against the United States which

may be reasonably declared to belong to the class known at the common law as petty offenses, punishable *under legislative sanction* without the intervention of a jury, need not here be attempted. Nor is it necessary to express any final judgment upon the question whether the particular crime here involved might, *by statute*, be placed in that class and tried without a jury. It is enough to say that even if Congress could place it in that class, and authorize its trial by summary proceedings, without a jury, or with a jury of less than twelve, it has not done so." His opinion was largely based upon the ground that there was no legislative authority for waiving a jury in that case. "No court at common law assumed, without a jury, to try any offense, however trivial or petty, except under the authority of a statute conferring authority to that end. * * * My point is that no criminal offense or crime against the United States can be tried except by jury, if the plea be not guilty, unless it be a petty offense or crime, *and* unless the legislative department declares that it may be so tried. If the offense or crime be, in reality, in its essence, a petty one, then Congress may authorize it to be tried without a jury. But Congress has not so declared in respect of the offense or crime charged against the present defendant." *Ib.* If Congress could authorize a trial without a jury of cases like this under consideration, the act of the territorial legislature, Sec. 1664, R. L., is equally constitutional. The offense of gambling is not "in its essence" one which either Congress or the legislature could not make triable without a jury subject to appeal or, as in this case, to the defendant's right, if demanded, to a jury in the first instance. Similar legislation is generally held to be valid and we know no case to the contrary under constitutional provisions declaring the right of trial by jury inviolable. *In re Staff*, 63 Wis. 285; *Ward v. People*, 30 Mich. 115; *State v. Kaufman*, 51 Ia. 578; *Lavery v. Com.*, 101 Pa. 560; *State v. Worden*, 46 Conn. 349; *Edwards v. State*, 45 N. J. L. 419; *Com. v. Dailey*, 12 Cush. 80; *Davst v. People*, 51 Ill. 286. And see *Hallinger v. Davis*, 146 U. S. 319; *In re Belt*, 159 U. S. 99.

A defendant may wish to be tried by a magistrate in the first instance, thereby learning what evidence will be produced

against him on appeal to a jury. There is no constitutional prohibition against his doing so. As the petitioner did not demand a jury the statute gave the magistrate jurisdiction to try the case, subject to appeal. When a jury is demanded in a case like this not requiring an indictment, the magistrate commits the defendant for trial by jury in the circuit court if in his opinion the evidence adduced shows probable cause to believe that a jury would convict. Sec. 2806, R. L. We hold that the statute is constitutional and that the petitioner was lawfully tried and convicted.

The judgment of the circuit judge is reversed and the petitioner is remanded to custody.

G. D. Gear for petitioner.

M. F. Prosser, *Deputy Attorney General*, for the Territory.

CONCURRING OPINION OF FREAR, C.J.

I concur in the foregoing decision but base my opinion on the question of disqualification in part upon different grounds.

After hearing counsel I feel if anything more strongly than when I dissented in the *Notley* case that having taken an active part as counsel in a case is a disqualification under Hawaiian practice and precedents, but I do not see how that has any bearing on the present case.

Even if I had given a formal opinion as to the validity and effect of the statute, as well as expressed an approval of it, as an attorney to a client in some other case, I would not for that reason be disqualified in this case, with which or with either of the parties to which so far as this case or this statute is concerned I had never had anything to do. But as matter of fact I have not sustained in respect of this statute in any case or matter or with any person or body any relation of attorney or other analogous relation.

The question therefore is reduced to this, whether an expression of approval of a statute to some person disqualifies a judge. An expression of approval or an opinion on either the law or the facts of a case would not in itself disqualify even a juror from sitting in that very case, for it might appear that he could

give a fair verdict notwithstanding. If a judge were disqualified because he had expressed an opinion on the law or an approval of it, he could not sit in any case in which was involved a question of law upon which he had expressed an opinion as a student, or as an attorney or in a decision or dictum by him as a judge in some other case, or in an opinion to the executive or legislative branch of government such as the justices of this court were for many years and the justices of many other supreme courts are now required by constitutional provision to give under certain circumstances. That would be absurd. In the absence of constitutional or statutory provision to the contrary one may sit as a member of an appellate court on an appeal from his own decision as a trial judge in a case, and that was done here regularly until the reorganization of the judiciary in 1892, and has been done in many other jurisdictions. Most Hawaiian statutes have been drafted by members of the supreme court or members of the bar who afterwards became members of the court or received the votes of members of the legislature who afterwards became members of the court and yet it has never before been contended that any such judge was disqualified for that reason from sitting in a case involving the construction of any such statute. This is equally true to a greater or less extent in other jurisdictions. I may add, though it is immaterial, that the precise question now raised under the statute was never suggested and had never occurred to me and I had never formed any opinion in regard to it.

TERRITORY OF HAWAII, BY C. S. HOLLOWAY,
SUPERINTENDENT OF PUBLIC WORKS, v. E. J.
COTTON, C. E. COTTON AND JAMES B. AGASSIZ,
PARTNERS UNDER THE NAME OF COTTON
BROS. & CO.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 23, 1906.

DECIDED APRIL 9, 1906.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF HARTWELL, J.

NEW TRIAL—order for, when not interlocutory.

Although an order granting a motion for a new trial is ordinarily interlocutory and not reviewable on error before final judgment, it is final and reviewable if it is made in what must be considered a new proceeding, as when the court had no power to make it. In order to be final for the purposes of review it need not be absolutely void so as to be subject to collateral attack.

Id.—when too late for court to order of own motion.

A trial judge cannot grant a new trial of his own motion in a civil case at the second term after that in which the verdict was rendered and judgment entered, and, a fortiori, his successor cannot in vacation after the third term after verdict and judgment; but it is held in this case that the decision of the trial judge and the order of his successor for a new trial were not made of their own motion but in response to motions by the defendants.

Id.—power or duty of trial judge's successor to order.

The rule that a successor to a trial judge should grant as matter of course a motion for a new trial which has been made and perfected within the proper time—because the movant has a right to have the motion decided and the succeeding judge cannot decide it for want of knowledge of the facts and the trial judge cannot because of his death or the expiration of his term of office—has no application when the movant has no right to have the motion decided for the reason that it was not perfected by the filing of a bond within the prescribed time.

Id.—writ of error which brings up order for, brings up decision on which order was based.

When an order for a new trial made by a succeeding judge is merely the formal order entered in pursuance of the decision of the trial judge and not an independent order, a writ of error brought within six months to review the order brings up also the decision though the latter was filed more than six months before the writ was issued. In such case the attack upon the decision is not collateral.

OPINION OF THE COURT BY FREAR, C.J.

The facts are stated somewhat fully in the decision on the motion to quash, ante, p. 374. Briefly, the defendants, after a verdict against them, moved for a new trial but failed to file the requisite bond within ten days after verdict as required by statute. The trial judge, Gear, holding that the ten days ran from judgment and not from verdict, allowed judgment to be entered and the bond filed after the expiration of the ten days from verdict but within ten days from judgment and heard the motion. He did not decide it, however, until the second term of court thereafter when, shortly before the expiration of his term of office, he cabled to the clerk from San Francisco "Order motion for new trial granted. Grounds mailed," and shortly after the expiration of his term of office the clerk received by mail from San Francisco the written opinion of the judge, concluding "a new trial should be granted." At the next term, that is, the third term after the verdict was rendered and the motion for a new trial made, the defendants moved. Judge Gear's successor, Judge Lindsay, that "a formal order be entered granting the defendants a new trial," which was done in vacation after the expiration of that term. The plaintiff then brought this writ of error to review that order.

The defendants moved to quash the writ on the ground that an order granting a new trial was interlocutory and therefore not the direct subject of a writ of error. We held, however, in the decision above referred to, that, although ordinarily an order granting a new trial was not reviewable on error immediately, that is, before final judgment after the new trial was

had, whether reviewable immediately on exceptions or not, the rule was different when the trial court was without power to make the order when it was made, and that the trial court was without power to grant the motion for a new trial for the reason that the bond was not filed within ten days after verdict and that although the failure to file the bond within the prescribed time could be waived by the plaintiff it was not waived.

The defendants now in their argument upon the merits of the writ, while conceding that the decision on the motion to quash was correct on the arguments then presented and that on its surface it finally disposed of the question of their right to the new trial, contend that there are other arguments, now presented, which show that it was in fact erroneous. It was suggested by the court during the argument that it might be a question whether that decision could virtually be reversed upon a consideration of the merits of the case or otherwise than on a reconsideration of the motion to quash, as, for instance, upon a rehearing of that motion. The defendants thereupon filed a petition for a rehearing of that motion. In view, however, of our conclusion upon the merits we will proceed as if the right to petition for a rehearing on the motion had not been waived by argument on the merits and also as if the petition for a rehearing would be granted notwithstanding the fact that, as it states, it is based on points which were not presented through inadvertence of counsel and not considered through no fault of the court, or as if the additional arguments now presented might properly be considered on the merits irrespective of the decision on the motion to quash.

The defendants contend that Judge Gear's decision on the motion for a new trial was not absolutely void but was at most merely erroneous or voidable inasmuch as he had jurisdiction of the parties and the cause and power to grant a motion for a new trial and power to order a new trial of his own motion, and that it cannot be said from the record that he did not grant the new trial of his own motion, and that the requirement of the bond was not jurisdictional because it could be waived and jurisdictional defects cannot be waived; that his decision, not

being absolutely void, cannot be collaterally attacked; and that the present attack by writ of error to reverse Judge Lindsay's order is collateral as to Judge Gear's decision because it is not a direct proceeding to reverse that decision and the time has expired for such a proceeding and the fact that the attack is made in the same case does not make it direct. Also that Judge Lindsay's order merely supplements Judge Gear's decision and cannot be attacked unless Judge Gear's can be; that that order was not void because Judge Lindsay, as well as Judge Gear, could order a new trial of his own motion on the suggestion of the defendants, and that the motion for a formal order may be viewed as such a suggestion; and that since Judge Lindsay had the power to order a new trial his order could stand by itself and was at most merely voidable or erroneous and not void and hence was interlocutory and not reviewable at this stage on error. Also that Judge Gear's decision was not void or at least cannot be considered void in this proceeding by reason of his absence from the Territory or the expiration of his term of office.

It is unnecessary to say whether each or either of the circuit judges was absolutely without jurisdiction to order a new trial or whether the decision or order for a new trial was absolutely void so as to be subject to collateral attack. The word "jurisdiction" is somewhat elastic. It does not follow that because a defect can be waived the court has jurisdiction or that because it cannot be waived the court is absolutely without jurisdiction. To illustrate, there are cases in which a court of equity, for instance, might dismiss a bill for want of jurisdiction and even would do so of its own motion if it noticed the defect and yet if it should not do so and the question were not raised the decision would not be absolutely void. See *Kuala v. Kuapahi*, 15 Haw. 300, and cases there cited. Likewise, if this court did not have jurisdiction of reserved questions in equity a decision in such a case would not be void. *Brown v. Brown*, 15 Haw. 308. Similarly, an appellate court might properly dismiss an appeal for want of jurisdiction because the statutory requirements of an appeal have not been complied with, as

when the appeal bond has not been filed or the appeal noticed within the time prescribed, or because the appeal is from an opinion as distinguished from a judgment or decree, or because the judgment appealed from is of an interlocutory nature, and yet a decision in any such case, if the defect were not urged in due season, would not be void. See *Hind v. Wilder's S. S. Co.*, 14 Haw. 219, and cases there cited. As shown in the decision on the motion to quash, even those courts which hold that the want of an appeal bond is a jurisdictional defect which cannot be waived by the parties hold also that it cannot be taken advantage of after decision when it was not noticed before decision. In *Ferreira v. Honolulu R. T. & L. Co.*, 16 Haw. 797, in which, as in the present case, it was objected that the trial judge should not have entertained a motion for a new trial for want of a sufficient bond, this court said: "The requirement that a sufficient bond should be filed was jurisdictional. * * * A sufficient bond not having been filed the court below had no jurisdiction to entertain the motion for a new trial." In general jurisdiction over the subject matter cannot be conferred by waiver or consent. On the other hand there are cases in which a judgment would be absolutely void for want of jurisdiction, and yet in which the jurisdictional defect might have been waived, as, for instance, where the defect consists in want of notice to the defendant. In the decision on the motion to quash we did not hold that the decision and the order for a new trial were absolutely void so as to be subject to collateral attack. We held merely that the trial court was without power to grant the motion for a new trial and that consequently the motion for a new trial should be regarded as a new proceeding, in which case the order granting the new trial would be a final order in that proceeding and therefore reviewable. This is the view taken by the cases there cited and other cases. See *Hume v. Bowie*, 148 U. S. 245; *Macfarland v. Brown*, 187 U. S. 244; *Deering v. Creighton*, 26 Ore. 556; *Killip v. Empire Mill Co.*, 2 Nev. 34, 42; *Tutman v. B. & O. R. R.*, 190 U. S. 38; *Manning v. Ger. Ins. Co.*, 117 Fed. 52. Although the jurisdictional defect might have been waived, as it might have been in the cases just cited, it was not waived.

It is conceded that the attack upon Judge Lindsay's order is direct since that order is made the direct subject of the writ of error and the writ was brought within the time prescribed by statute; also that the motion for a formal order presented to Judge Lindsay was not a motion for a new trial, and that such a motion could not have been made at that time because the time within which it could have been made had expired; also that Judge Lindsay's order cannot be regarded as a grant of the original motion for a new trial made before Judge Gear. It is equally clear to us that it cannot be regarded as made by Judge Lindsay of his own motion, for it was made in response to the defendant's motion, is entitled "Order granting defendants' motion for a new trial," and, after reciting that the defendants had made such a motion and that the court had duly considered it, concludes, "Said motion is granted; and, it is therefore and hereby ordered that in the above entitled action a new trial be had." Moreover, it was, in accordance with the motion, a mere formal order not made by the judge as an exercise of discretion. Even if it were made by the judge of his own motion and as an exercise of his discretion, it was made too late and at an improper time, for it was made in vacation and after the lapse of three terms after the term at which the verdict was rendered and judgment entered. Of course, if a motion were properly made in season it could be decided at a subsequent term, but we are now considering an order by the court *sua sponte*. Whether in this jurisdiction a trial judge could order a new trial of his own motion under any circumstances after the expiration of the ten days prescribed for moving for a new trial we need not say. We are not aware that that has ever been done. In England, under peculiar or extraordinary circumstances in criminal cases, the court may order a new trial of its own motion after the expiration of the time, namely, the first four days of the next term, during which a motion for a new trial may be made. In the United States in the absence of statute the general rule is that except under certain circumstances a court loses control over its judgments after the expiration of the term at which they are made. Statutes often

limit the time for moving for a new trial to a short period after verdict or judgment. New trials are seldom granted by a court of its own motion and then as a rule only under special circumstances and at the time of the verdict or soon afterwards. In the present case the order was made after the time for moving for a new trial, after the time limited for bringing the case up on exceptions or error, and after the third term following that in which the verdict was rendered and judgment entered—more than a year after judgment was entered.

It is suggested, however, by counsel that Judge Lindsay's order might be sustained not as one made of his own motion merely but as one that might properly be made or ought to be made by a successor to a judge who tried the case and who could not make the order by reason of the expiration of his term of office. The cases relied on are *Bass v. Swingley*, 42 Kans. 729 (22 Pac. 714); *Ohms v. The State*, 49 Wis. 415; *Woodfolk v. Tate*, 25 Mo. 597; *Wright v. Judge*, 41 Mich. 726. These cases, as well as many others including that of *Hume v. Bowie*, supra, show that when a party has a right as, for instance, to have a motion for a new trial which has been presented within the prescribed time decided, or to have a bill of exceptions which has been presented within the prescribed time settled, cannot be deprived of that right by the death or illness or expiration of the term of office of the judge who presided at the trial, and that if another or succeeding judge cannot perform those functions for want of a proper record upon which he can exercise a proper discretion a new trial should be ordered as a matter of course. These cases, however, have no application to the present case. The bond was not given within the prescribed time, and the defendants therefore did not acquire a right to have the motion passed upon by the trial judge and consequently would not lose a right by reason of the expiration of the trial judge's term of office and the inability of his successor to pass upon that motion. Indeed, the reasons given in these cases for holding that a succeeding judge cannot pass on a motion for a new trial, namely, because of the discretionary

character of that function and the want of a proper record, would, if they hold in this jurisdiction, prevent Judge Lindsay from granting a new trial of his own motion.

The only way in which Judge Lindsay's order can be regarded is that it was a formal order based upon or made in pursuance of Judge Gear's decision, like the entry of any other formal order, judgment or decree based upon or made in pursuance of an opinion, decision, judgment or verdict rendered. Such being the case, the order cannot be considered independently of the decision, and the writ in bringing up the order for review brings up also the decision, just as a writ of error that brings up any judgment brings up the opinion or decision on which the judgment was based. The attack upon Judge Gear's decision is therefore direct, for, being direct on Judge Lindsay's order, it is direct upon the decision on which that order depends.

Judge Gear's decision cannot be regarded as made of his own motion. It granted the defendants' motion for a new trial. The cablegram states: "Motion for new trial granted. Grounds mailed." The "grounds mailed" form the decision referred to. This states that the defendants made the motion for a new trial; that this was argued and submitted; that there were two main questions raised in the brief and argument of the defendants; sets forth these; and then proceeds to consider at length the respective contentions made in the argument upon the motion and concludes that a new trial should be ordered. Even if the decision had been made by the judge of his own motion it could not stand for the reason already stated why Judge Lindsay's order could not stand, namely, because it was made too late. It was not made until the latter part of the second term of court after the verdict was rendered and judgment entered—nine months after judgment was entered.

Sufficient has already been said in the decision on the motion to quash and in the present decision to show that Judge Gear's decision cannot stand as a decision granting the defendants' motion for a new trial.

It will be unnecessary to say whether Judge Gear's decision, if it could stand so far as the want of a bond on the motion for a new trial is concerned, could stand also notwithstanding that it was cabled or mailed from without the Territory and that the mailed decision did not arrive in the Territory and was not filed until after the expiration of the judge's term of office.

The order granting a new trial is reversed.

E. C. Peters, Attorney General, for plaintiff.

S. H. Derby (Kinney, McClanahan & Cooper on the brief) for defendants.

WILLIAM L. WHITNEY v. JOHN ROSS.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 2, 1906.

DECIDED APRIL 11, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MORTGAGEE AND ADMINISTRATOR—*surplus after foreclosure sale.*

Upon the foreclosure under a power of sale made after the death of the mortgagor the surplus, after payment of the mortgage debt, goes to the administrator of the estate of the mortgagor and not to the mortgagor's heirs, when it is required to pay the decedent's debts.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff, as administrator of the estate of a mortgagor, brought assumpsit against the assignee of the mortgagee to obtain the surplus of \$710 remaining in his hands after payment of the mortgage debt from the proceeds of foreclosure under a power of sale, which surplus money the defendant refused to pay to the administrator on the grounds that the mortgage provided for its payment to the mortgagor, his heirs

or assigns and that Sec. 2165, R. L., requires that "it shall be paid over to the owner of the mortgaged property." It appeared in evidence that the estate was insolvent. Jury being waived, the court gave judgment for the defendant, on the grounds above stated, to which the plaintiff excepted.

In addition to the grounds on which the defendant refused to pay the surplus to the administrator, namely, the provision cited from the statute and the words in the mortgage requiring payment to the mortgagor, his heirs or assigns, he contends that the mortgaged land, subject to the mortgage, descended to the heirs upon the death of the mortgagor and therefore that the heirs are entitled to the surplus money which represents, in a way, the equity of redemption. It was in this view that in *Wright v. Rose*, 2 Sim. & St. 321, the court held that "the estate being unsold at the death of the mortgagor the equity of redemption descended to his heir, and he is now entitled to the surplus produce." He also contends that the rights of the heirs cannot be disposed of in this action as they are not made parties. But however it may be in cases in which an estate is shown to be sufficient to meet the claims of creditors we think that the surplus money is properly paid to the administrator when, as in this case, it is clear that all of it is required for the payment of debts.

Exceptions sustained, judgment reversed.

Castle & Withington for plaintiff.

Magoon & Lightfoot for defendant.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES AND DAVID F. NOTLEY *v.* CECIL BROWN AND ANTHONY LIDGATE, PROPONENTS OF THE WILL OF CHARLES NOTLEY, DECEASED, JOHN NOTLEY, A MINOR, VICTORIA M. K. NOTLEY, A MINOR, LILY NOTLEY, A MINOR, AND WILLIAM NOTLEY, A MINOR, BY W. S. WISE, THEIR GUARDIAN AD LITEM, AND EMMA DANFORD.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED MARCH 22, 1906.

DECIDED APRIL 13, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

WRIT OF ERROR—*rendition of judgment.*

Whether under the statutory provision that writs of error may only be had within six months from rendition of judgment "rendition" should be construed to mean "entry" is not decided.

Id.—*questions previously decided on exceptions.*

A writ of error bringing up questions already decided by this court on exceptions in the same case will on motion be dismissed. Only proceedings subsequent to and not in conformity with the decision on the exceptions may be reviewed afterwards on error.

APPEALS—to *United States Supreme Court.*

This court decides questions as if its judgment was to be final and conclusive, and it should neither accelerate nor retard appeals from its decisions.

OPINION OF THE COURT BY WILDER, J.

(Hartwell, J., dissenting.)

This is a motion to quash the writ of error on the grounds (1) that the writ was not issued within six months from the "rendition of judgment," (R. L. Sec. 1869,) and (2) that all

the errors assigned have been heretofore decided by this court in 15 Haw. 435, 700; 16 Haw. 66.

It is claimed by defendants in error that the judgment herein was rendered and filed on January 29, 1903. On that day the presiding judge signed and filed the following "Order for entering up judgment": "It is hereby ordered that the clerk of this court do sign and enter up judgment in favor of proponents of the last will and testament of Charles Notley, deceased, in accordance with said verdict, and the decree admitting said will and codicils to probate is hereby affirmed. Done in open court at Hilo this 28th day of January, 1903." On January 29, 1903, a judgment in accordance with said order was filed bearing the following endorsement of the clerk: "Filed January 29, 1903. Daniel Porter, clerk." This judgment was not signed at the end by any one. On June 8, 1905, plaintiffs in error filed a motion to set aside the order of January 29, 1903, above quoted, which motion was denied on August 28, 1905. On June 8, 1905, defendants in error moved that the clerk be ordered to sign the judgment which had been filed on January 29, 1903. This motion was granted without prejudice to the motion of plaintiffs in error, and the judgment was signed on the same day as of the 28th day of January, 1903. No objection is made to the form of the judgment.

There is considerable force in the contention of defendants in error that the judgment herein was rendered on January 28, 1903. A writ of error can only be had within six months from the "rendition of judgment." Sec. 1869, R. L. "Rendition" and "entry" of judgment have been used more or less interchangeably by this court in some of the past cases. The terms "rendition" and "entry" were correctly used in *Kapepee v. Kupahi*, 16 Haw. 799, where, in a jury waived case, it is stated that judgment was rendered at the close of the trial and was entered some days thereafter. It is contended by the plaintiffs in error that the past construction by this court of the writ of error statute has been to regard rendition as meaning entry, but that, if that is not so, it should only be laid down as a rule for future guidance and the writ should not be quashed

on this ground. As the other ground of the motion is decisive of the matter, the decision will be based on that ground.

The second ground for quashing the writ is, that all the errors assigned have been heretofore decided by this court. There is no question but that the first five assignments of error have been disposed of by this court. The other assignments of error have reference to the order of January 29, 1903, and the proceedings subsequent to the overruling of the exceptions, all of which are referred to above. As already pointed out it is at least an open question whether these subsequent proceedings were necessary, but if they were the action of the trial court in each instance was in exact compliance with the opinion of this court on the overruling of the exceptions. See 15 Haw. 435, 700; 16 Haw. 66. This court said in *Meheula v. Pioneer Mill Company*, 17 Haw. 94, that "if no judgment was entered on the verdict it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law."

Error and exceptions are concurrent methods for the correcting of errors made in the trial of law cases in the circuit courts, the conditions and limitations of each method being different. *Cummings v. Iaukea*, 10 Haw. 4.

In *Ferreira v. H. R. T. & L. Co.*, 16 Haw. 406, it was held that where a party has brought a bill of exceptions to this court and has also sued out a writ of error covering the same matters he will be obliged to elect which procedure he will follow. The court said on page 408: "Though the remedies are concurrent it does not follow that the party is entitled to both of said remedies at the same time any more than he would be entitled to maintain two actions for the same cause in courts of concurrent jurisdiction."

That being so, it would seem to follow that a party after pursuing one remedy to termination, namely, by exceptions, could not thereafter pursue the other remedy, namely, writ of error, to determine exactly the same questions. It would be like an appeal or writ of error from this court to this court. If this could be done there would be no end to litigation and appeals,

and the courts themselves might be turned into instruments of injustice by an obstinate litigant. This is the inference to be drawn from the language of this court in *Cummings v. Iaukea*, supra, where it is said that "undoubtedly if the ground of error in the cause had been made matter of exception and had been decided in the supreme court, error would not lie."

This view is sound on principle and has the support of the United States Supreme Court, to say nothing of the courts of the different states.

It is well settled that the second writ of error brings up nothing for revision except the proceedings subsequent to the mandate; and it follows that, if those proceedings are merely such as the mandate commanded and were necessary to the execution of the mandate, the writ will be dismissed, as any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be permitted. *Cook v. Burnley*, 11 Wall. 677.

An appeal from a decree which the circuit court passed in exact accordance with the mandate of this court upon a previous appeal will upon motion of the appellee be dismissed with costs. *Stewart v. Salaman*, 97 U. S. 361. See also *Humphrey v. Baker*, 103 U. S. 736; *Aspen Co. v. Billings*, 150 U. S. 31.

In *Hartshorne v. Sleight*, 3 Johns. (N. Y.) 554, where a second writ of error bringing up errors previously decided in the same case was quashed, it was said (p. 563): "The decision heretofore made in this case, so far as it establishes a general principle, is the law of the land. So far as it is confined exclusively to the parties, it is *the law of the case*, and can never be called in question, or examined in any court of this state. In quashing this writ, we declare it a nullity; we declare that it ought not to have been issued; and we declare, that after having deliberately considered and solemnly adjudged the controversy before us, we will not permit a round of vexatious litigation and an accumulation of unnecessary expense."

We have examined all the citations of plaintiffs in error and find that they are not in point.

Counsel for plaintiffs in error seem to think that, unless this court entertains jurisdiction and affirms the judgment of the lower court, the questions decided by this court on the bill of exceptions cannot be reviewed by the Supreme Court of the United States. On that point reference is made to the case of *Gregory v. McVeigh*, 23 Wall. 294. That was a case from Virginia, where "the Supreme Court of Appeals is the highest court of the state. Judgments of the Corporation Court of Alexandria can only be taken there for review on leave of the Court of Appeals itself or some judge thereof. Gregory, against whom a judgment had been rendered in the Corporation Court, applied to each and every one of the judges of the Court of Appeals for a writ of error, but his applications were all rejected because the judgment was 'plainly right.' This, by a statute of Virginia, was a bar to any application to the court for the same purpose, and Gregory thereupon sued out a writ of error from this court to the Corporation Court, as the highest court of the state in which a decision in the suit could be had. Upon a motion to dismiss we upheld our jurisdiction, because everything had been done that could be to take the case to the Court of Appeals, and its doors had 'been forever closed against the suit, not through neglect, but in the regular order of proceeding under the law governing the practice.' Had the court itself refused the leave upon an application for that purpose, its refusal would have been equivalent to a judgment of affirmance, which could have been reviewed in this court; but as in the regular course of proceeding that had been done which prevented either a review of a judgment of the Court of Appeals or an application to that court for a writ of error, the judgment of the Corporation Court had become the judgment of the highest court of the state in which a decision in that suit could be had, and consequently was reviewable here as such." *Fisher v. Perkins*, 122 U. S. 526.

But in any event that question does not concern this court. This court, except where the matter is controlled by the decision of a higher court, must decide questions coming before it as if no revisionary tribunal existed, and as if its judgment

was to be final and conclusive. It should neither accelerate nor retard appeals from its decisions. See *Hartshorne v. Sleight*, *supra*.

It was suggested that the plaintiffs in error, after the verdict of the jury had been rendered and exceptions thereto had been overruled by this court, might have set up other grounds for resisting the probate of the will, but no such other grounds are set forth, and, in the absence of such a showing, we cannot assume that there were any, even if they could have been set up.

The judgment of this court is that the motion to quash the writ should be granted, and accordingly the writ is dismissed.

S. M. Ballou (*Ballou & Marx* on the brief) for plaintiffs in error.

W. L. Stanley (*Holmes & Stanley* on the brief) for defendants in error.

DISSENTING OPINION OF HARTWELL, J.

The first ground of the motion to quash is that this court has "already decided the questions now sought to be reviewed" and the second that the writ was not issued within six months from rendition of judgment, namely, January 29, 1903. The opinion of the court considers these grounds in the reverse order named in the motion.

I think that the motion cannot be granted on either of the grounds named. The judgment was not rendered in such form that a writ of error would lie to it until June 8, 1905: A judgment cannot be made 'as of' an earlier date than it was actually made for the purpose of shortening the time in which a writ of error can be taken out. *Rubber Co. v. Goodyear*, 6 Wall. 156. The only object of a *nunc pro tunc* judgment is "to see that the parties shall not suffer by the delay." *Mitchell v. Overman*, 103 U. S. 65. It "should be granted or refused as justice may require in view of the circumstances of the particular case." *Ib.*

All of the questions sought to be reviewed by the writ of error were not passed upon by the decision upon the exceptions.

The rulings which were not passed upon were those made by the circuit court, after the allowance of the bill of exceptions, in denying the contestants' motion to set aside the order of the circuit judge filed January 29, 1903, affirming the decree of Judge Little admitting the will to probate and granting the proponent's motion that the clerk be ordered to sign the judgment in conformity with the order of the judge of January 28, 1903. The exceptions taken by the contestants, allowed and signed by the presiding judge June 8, 1905, are as follows:

"Contestants except to the allowance of proponent's motion that the Clerk of Court be ordered to sign the form of judgment filed January 29th, 1903, and to the judgment so signed on the ground that such allowance is illegal, null and void and not justified by the law or evidence or record herein and to the judgment upon the ground that said judgment is contrary to the law and evidence and weight of evidence and without authority of law and is illegal, null and void."

Upon these exceptions there has been no ruling thus far by this court.

The right of the circuit court to affirm the decree of the circuit judge in probate appears to me to require serious consideration, and so of the proper form of judgment when issues of fact are tried by jury upon appeal from a probate decree.

The right of appeal from a decree of a circuit judge at chambers to the circuit court is not expressly granted, although clearly recognized by statute. This is a result, it must be conceded, of defective legislation. Circuit courts formerly consisted of the judge of the circuit associated on the bench with a justice of the supreme court who presided at the term. At a later date the first circuit court was held by a justice of the supreme court, the office of the circuit judge of that circuit being abolished. By the Judiciary Act of 1892 the circuit courts were held by the circuit judges. The jurisdiction of the supreme court being mainly appellate, and appeals lying to the supreme court from all decisions and decrees of the circuit judges at chambers "except in cases in which the appellant is entitled to appeal to a jury," and with the proviso that "in any case in which the law allows an appeal from the decision, judg-

ment, order or decree of a judge in chambers to be tried before a jury" the judge appealed from "shall not preside at the trial of such appeal before a jury," but a circuit judge from some other circuit. Sec. 1859, R. L. The only cases in which the appellant could have a jury trial were the probate cases enumerated in the act of 1864 (Sec. 1843, R. L.), namely, in estates of over \$500 and upon issues of fact upon which either the appellant or appellee should move the appellate court for a jury trial. Writs of error to the supreme court lay from any decision of a police justice, circuit judge or circuit court or any justice of the supreme court, which, after hearing the case, was authorized by statute "to give judgment either affirming or reversing or modifying the former judgment or remanding the cause for a new trial." Sec. 1159, Civ. Code, 1859. Under the act of 1892 (Sec. 1860, R. L.), in cases of appeals from decisions of a circuit judge, the supreme court "shall have power to review, reverse, affirm, amend, modify or remand for a new hearing." Sec. 1860, Ib. In the various changes in the procedure made by the legislature the right of appeal from a circuit judge to the circuit court was not retained, although the statute concerning the trial of issues of fact by a jury upon an appeal being taken from a probate decree of a circuit judge to the circuit court was retained, applying in cases of estates of over \$500 in value.

It is difficult to say that under the statute an appeal from a probate decree goes any further than the trial by jury of specified issues of fact or that an appeal could be allowed at all except for the trial of such issues. I therefore think that in this case the circuit court had no authority by statute or under any implied power to pronounce a judgment affirming the decree of the circuit judge in probate admitting the will to probate. Power to affirm implies power to reverse. If the findings of the jury had been adverse to the appellant judgment would properly have been made which was applicable to those findings. If the judgment had been in favor of the contestants they could then move the circuit judge, on notice of it, to reverse his decree, and so upon a judgment in favor of the

proponent he could move the circuit judge to affirm his decree. This seems to me to be the correct practice.

I therefore feel compelled to dissent from the decision of the court upon the motion to quash.

FANNIE ZEAVÉ v. NATHAN ZEAVE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 29, 1906.

DECIDED APRIL 30, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

DIVORCE—notice to libelee without the Territory.

In order to obtain jurisdiction over the libelee in a divorce case by personal notice to him without the Territory, under R. L., Sec. 2231, he should be notified, among other things, when to appear. It is not sufficient for a private person to leave with him in the foreign state a copy of the libel and of a summons in the usual form for personal service by an officer within the Territory.

APPEARANCE AFTER DECREE—when general.

An appearance after decree to move to open the default and set aside the decree on the grounds of excusable inadvertence and want of jurisdiction and for leave to answer and present a defense is a general appearance, rendering unnecessary further service or notice in order to obtain jurisdiction over the libelee.

OPINION OF THE COURT BY FREAR, C. J.

This is an appeal from the denial of a motion to set aside a decree of divorce and permit the libelee to answer and present his defense, he having made no appearance before the hearing and decree. The motion was based upon the grounds (1) that the libelee's counsel, without fault on the part of the libelee, failed to answer by reason of excusable inadvertence, and (2) that the trial judge was without jurisdiction for want of compliance with the statutory requirements as to service upon

the libelee. In our opinion the first ground is untenable but the motion should have been granted on the second ground.

The libel was filed February 21, 1905, and contained an allegation that according to the best knowledge and belief of the libelant the libelee was then residing at San Francisco, California. Summons in the usual form was made out and attached to the libel but was not issued to any of the officers to whom it was directed. On April 11, 1905, an affidavit by one Thomas M. O'Connor was filed to the effect that on March 16, 1905, at San Francisco, he served the libel and attached summons upon the libelee; and on the same day, after a hearing, a divorce was decreed, the judge finding, among other things, that the libelee was duly served with a certified copy of the libel on March 16, 1905, at San Francisco.

The statute (R. L., Secs. 2230, 2231) provides four methods of obtaining jurisdiction over the libelee, namely, by personal service of summons in the usual method if he is within the Territory, by personal notice if he is without the Territory, by voluntary appearance, and by publication if his address or residence cannot be ascertained for six months. In this case the only method attempted was the second—by personal notice without the Territory. It is true that preliminary steps were taken, by making out and attaching a summons in the usual form, to obtain jurisdiction by the first method, but the necessary remaining steps were not taken, and apparently the preliminary steps under the first method were taken only for the purpose of helping out the second method by having something to indicate a return day and other matters of which it was necessary to give the libelee notice under the second method. But this cannot aid the libelant. The summons that was made out and attached to the libel was, as already stated, in the usual form for service by a Territorial officer within the Territory, commanding the officer to summon the libelee to appear ten days after service if he resided on the Island of Oahu, otherwise twenty days after service, and to have then and there the writ with full return of his proceedings thereon. It was not delivered to any officer to whom it was directed and of course was

not served or returned by an officer, and the twenty days after service referred to in the writ had reference to service by an officer within the Territory. It was not directed to the libelee nor was it issued under an order of the court. Leaving a copy of the summons with the libelee merely gave him knowledge as to when he would be obliged to appear if he had been duly served within the Territory. It did not give him notice as to when he should appear under the existing circumstances. It may be noted in passing that there is no authority for making the return day ten days after service in divorce cases when the respondent resides on the island of Oahu as there is in certain other classes of cases. Omitting the form of summons as having no application in the case of personal notice without the Territory, there remains only the libel itself, notice of which, if of anything, was given to the libelee, and a copy of which alone the trial judge found had been served on the libelee, but that indicated nothing whatever as to when the libelee should appear. The statute also is silent as to when a libelee should appear in case of personal notice without the Territory. The libelee, therefore, did not have notice as to when he should appear and his motion to set aside the decree and permit him to make his defense should have been granted.

It is unnecessary to say whether an issuance of summons and a return of "not found" is a prerequisite to pursuing the method of personal notice without the Territory or whether the decree was absolutely void so as to be subject to collateral attack. Until these sections of the statute, which appear to be defective and ambiguous in several respects, are amended the safest course would seem to be, in case jurisdiction is sought to be obtained by personal notice without the Territory, first to have summons issued in the usual manner and then if it is returned "not found" to obtain, upon a proper showing, an order setting forth the requisite particulars for personal notice without the Territory. Doubtless no further service or notice will be required in this case in order to obtain jurisdiction over the libelee, for he has made a general appearance. He moved not only to open the default and vacate the decree but also for

permission to answer and present his defense on the merits and subsequently took this appeal. Moreover, he did not appear specially in form and the motion was not based solely upon a want of jurisdiction.

The order denying the motion is reversed and the cause remanded to the circuit judge with directions to grant the motion.

E. A. Douthitt for libellant.

J. J. Dunne for libelee.

KAUKAU KAHULA, ALBERT TRASK, J. P. MENDIOLA, ISABELLA MAHINAKU LOVELL, SOMETIMES KNOWN AS BELLA MENDIOLA, J. J. DUNNE AND J. J. DUNNE AS ADMINISTRATOR OF THE ESTATE OF ANA KINI KAHILINA, DECEASED, v. SAMUEL KANEWANUI, AS ADMINISTRATOR OF THE ESTATE OF ISAAC H. KAHILINA, DECEASED, ELIZABETH KAIO, ROSE K. KAUKAHA, HANNAH SCOTE, SOMETIMES CALLED HANNAH SCOTT, PAULIKEAWE, AND A. K. MIKA.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

ARGUED APRIL 16, 1906.

DECIDED APRIL 30, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

BILL TO SET ASIDE WIFE'S DEED TO HUSBAND THROUGH M., THE INTERMEDIARY GRANTEE, ALLEGED TO HAVE BEEN OBTAINED FROM HER BY FRAUD, UNDUE INFLUENCE AND DURESS.

The deeds were made April 15, 1890, the wife died the following February and the husband November 17, 1902. A suit to set aside the deed was brought July 18, 1903. M., the intermediary grantee, was the witness mainly relied upon by the plaintiffs. He had refused to give them information to support a bill to set aside

the deed prepared by an attorney at the request of the plaintiff Trask in behalf of himself and the other heirs of the wife during the husband's lifetime. Held: That there was no evidence of fraud or undue influence and that the evidence of duress was not sufficient to justify a decree setting aside the deed, particularly in view of the delay in bringing the suit.

Id.—practice—misjoinder of administrators—summons giving certain defendants more time to appear than required by rule—issuing second summons to a defendant in place of one objected to as not served by an authorized officer.

Held: The administrators of the respective estates of the wife and husband were not properly joined, the one as a co-plaintiff and the other as a co-defendant. Motions to quash the second summons, as well as that which allowed more time than was requested, were properly denied.

Id.—joinder of M., as co-defendant—amendment to bill during trial—praying for more than equitable relief.

M. was a proper co-defendant. The court properly allowed an amendment of the bill at the trial to show the interest of a co-plaintiff, T. If a bill prays for more than equitable relief and a decree grants it, it is good as far as equitable relief is prayed for or granted.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiffs, July 18, 1903, brought a bill to set aside two conveyances made April 15, 1890, whereby Ana Kini, who died in February, 1891, wife of I. H. Kahilina, who died November 17, 1902, conveyed to the defendant, H. A. Mika, all her property, being an ahupuaa of land of several hundred acres and certain other parcels upon the island of Kauai, valued at \$27,198, excepting six acres each to her two sisters and grandson and five acres each to three moopunas, being two grand-nephews and a grandniece; Mika, by the other deed, conveying the same to the husband, Kahilina, a consideration of \$50 being named in each of the two conveyances.

The bill in substance charges that the husband secured the execution of these deeds by fraud, duress and undue influence exercised by him upon his wife and that the defendant Mika conspired with him in the fraud. The summons required the

defendants to appear twenty days after service. Two of the defendants moved to quash this summons on the ground that by circuit court rule 21 "the time for answering shall be ten days after service if the defendants reside on the Island of Oahu and twenty days after service if made upon either of the other Islands," the objection being that in regard to these two defendants the time for appearing was longer than the rule required. Another defendant having objected to the summons on the ground that it had not been served upon her by an authorized officer, a second summons was issued to her, service of the first having been vacated. That defendant then objected to the second summons on the ground that it was unauthorized. The motions to quash the summons made by the two defendants and to quash the second summons made by the third defendant were denied, as we think, properly.

All the defendants except Mika then demurred for lack of jurisdiction because of the failure to issue and serve such summons as the law provides, want of equity, misjoinder of Trask as a party plaintiff, the bill not showing that he had any interest in the land, misjoinder of Dunne as administrator of the estate of Ana Kini, misjoinder of the defendant Kanewanui as administrator of the estate of Kahilina, misjoinder of the defendant Mika, laches, multifariousness in seeking equitable relief by cancelation of the deeds, together with legal relief by quieting the plaintiffs' title. The demurrer was overruled and the defendants except Mika then answered over.

The administrators ought not to have been made parties, the administrator of the estate of Ana Kini not appearing to be concerned in the land for payment of the debts of the intestate or otherwise and no relief being sought against the administrator of the estate of Kahilina. Relief being sought against Mika he was properly a co-defendant.

The plaintiff Trask's interest, under the conveyance to himself of his father's title, was shown during the trial and the bill was amended accordingly by consent of court. The allowance of the amendment we consider to have been correct practice.

If, as appears, the bill prays for other than equitable relief

and the decree goes further than to grant it each would be good in respect of the equitable relief sought and granted.

The plaintiffs, being a surviving sister of the decedent Ana Kini and grantees of the respective estates of the other sisters and their heirs, are entitled to bring the suit against the defendants as heirs at law of the estate of the deceased husband Kahilina.

As the answer, besides denying the charges in the bill, sets up the defense of laches, we shall consider that defense in connection with the evidence on both sides. The averments in the bill, however, do not appear to us to have authorized its dismissal on demurrer on the ground that they do not sufficiently explain the delay in bringing suit.

The judge, after hearing the evidence, found that the charges in the bill were sustained and granted the decree prayed for. Without detailing the elaborate averments in the bill and answer, it will suffice to state the facts disclosed by the evidence on which the plaintiffs base their charges.

The case presented by the bill is that of a man marrying a woman much older than himself and without personal attractions with the purpose of getting her property, he being of a shrewd aggressive nature and she of a timid yielding disposition, inexperienced in business and dominated by his strong will; that he rudely thwarted her wish to provide for her two surviving sisters by giving them out of the seven hundred or more acres of her land one hundred and fifty acres each; that about ten months before her death she conveyed to him through the defendant Mika all her property, except six pieces aggregating thirty-three acres to her sisters, grandnephews and grandniece, when weak in mind and body and under his compelling influence; and that the defendant Mika participated in the transaction, drawing the deeds, being the intermediary grantee, and abetting a scheme to procure the property.

The marriage, of which there was no issue, was in 1875, when Kini was, as we infer, not far from 55 years of age. Keawe testified that she "might have been over 60;" the sister Kahula, that she was herself over 80 and that there was one

child between herself and Kini; and Mrs. Kaio, that the children were "a year or so between." This would have made Kahula about 51 years old in 1875. Kahula also testified of Ana Kini bathing with her in the stream at her place, to which they had ridden horseback, shortly before she died. It is unlikely that Ana Kini was then much, if any, over 70 years of age. It was customary among Hawaiians for women to marry younger husbands and to propose marriage to them. Ana Kini was a widow and may well have wished a husband who would protect her and look after her property. The evidence of his mercenary disposition is that the witness Keawe heard him tell her that he did not marry her for love but for her property, this being when he was under the influence of liquor while they were at the house of David Trask, her grand-nephew, and about two years before she died. Mika testified that shortly after the marriage he asked the husband how a young man like him should marry an old woman like her and that he answered that he didn't marry her on account of her shape but for her property. Mika lived at Koloa, 40 miles from Waipakea where Ana Kini and her husband and her relatives, about a half a mile from her, lived. Apart from his evidence, to which we will allude, there is nothing in the testimony from which to infer that the couple lived other than a happy quiet wedded life for about sixteen years and until her death, or that he habitually subjected her to his own will. The evidence of Mrs. Mendiola, a grandniece, was that on two occasions before she was twelve years old she heard them talking together—once he didn't want the children running over the land taking the fruit, when he scolded her and said her family were "no good" and he didn't want the children running around taking fruit, and the second time, six or seven months before her death, upon her complaining that she wanted to see her sisters, when she was crying and he scolded her and said he didn't want her to see them any more, and, evidently referring to these two occasions, that he treated her like a little child, would frighten her and scold her in a loud voice when she would tremble with fright. "Sometimes," said the witness, "he was

all right and other times he would be cross. He seemed to be treating her like a little child. Sometimes he would frighten her and scold her without any provocation; speak cross to her with a loud voice. Whenever he would speak to her in that loud voice she would tremble with fright." Sometimes at his house he treated us "very nice; was all right and kind."

If the reference to his treating her like a child, frightening and scolding her, talking in a loud voice to her did not refer merely to the two special occasions mentioned by the witness but was a matter of her general observation, it would be the kind of experience which unfortunately comes to many a married woman whose husband is not considered as dominating her will, but merely as a petulant man, inconsiderate of his wife's feelings. It is barely possible that the wife herself sometimes had a say. We are obliged to consider the evidence as rather trivial on this subject. Nor is there evidence from which we infer that Ana Kini was mentally weak.

Maile Keawe testified that Ana Kini, about two years before her death, "was not strong. Was kind of weak." Kahula says nothing about her sister's mental incapacity. The constable, Kuiki, who visited the Kahilina house and saw the deeds lying on the table and who thought Ana Kini must have been 80 years or more, says, "She was weak and could not walk upright; was very feeble," and that he judged from her being an old woman and feeble "that her mental condition was also weak;" that she "could not help herself, that there were some little children about her waiting upon her;" also that her husband "had to wait on her when they had their meals and get the food ready for her;" that he didn't know that he heard her speak at the time when he was there with Mika who was making out some papers. The constable's talk with Mika was to the effect that he asked him what those papers were, and after reading them turned to Mika and told him he was a rich man to get all this great tract of land for only \$50. Mika said, "It is not so. Look at this," handing him the other deed from Mika to Kahilina. Then Kuiki says he told Mika, "This is not a correct deed. This is not right," and suggested "that the proper thing

would be that Kini deed this property to some of her own blood relations and then from them to Kahilina, and then it would be proper," to which Mika replied, "I can't help it. Whatever I am told to do by Kahilina, that I am doing." When asked how Ana Kini acted, he answered, "I cannot say. I was not much taken with Ana Kini. She was in the room and then would come out sometimes." The deeds, he says, had been completed but not executed then. Mika was drawing some other paper. The next day the witness came again to the house and dined there. His seeing children about the house and the husband waiting upon the wife apparently refers to some time after the execution of the deeds. If there was any compulsion or duress upon Ana Kini, used upon that occasion by her husband, the constable heard and saw nothing of it.

There is no evidence of fraud committed upon any person in the transaction relating to the deeds, although Mika gave two reasons against their validity, namely, that there "was no delivery of the money and the deed, and the second reason is that this old woman was infirm and old and it was *not made clear* to her;" and Trask said that after Kahilina's death Mika told him that the deed was fraudulent (*apuka*), but Mika denies saying this. If the contents of the deed were misrepresented to Ana Kini that would be a fraud, but compelling her by threats to sign the deed, the contents of which were known to her, is not what is ordinarily meant by fraud. Nor is there evidence of undue influence in connection with the transaction other than might result from the use of threats from the husband to the wife.

The case, as presented by Mika's testimony, on which the bill must stand or fall, is one of duress. The evidence of the sister Kahula, an aged woman, who could not recall upon the second day of testifying what her testimony had been the day before, is rather fragmentary and incoherent, saying at one time that the deeds "were shown to me before the death of Ana Kini," upon an occasion which she finally fixes upon as the day when the deeds were executed and when Mika was at the house. She first says that she and her sister had no conversa-

tion with reference to the deeds; that she "objected to the papers to Kahilina. I told him I didn't like those papers, when he scolded me; told me that he didn't want me there and drove me out of the house. Everybody was around there and heard it who was there,—Kini, Isaac Kahilina, myself and Mika;" that her sister wanted to give her 150 acres and Kahilina objected that the land would all be gone if she was going to do that. Afterwards she said, "I merely saw the papers lying there and picked them up and looked them over," her sister at that time lying there but saying nothing else, being "frightened of Kahilina, who kept saying to her, 'what kind of a thing are you? You are a crazy old woman to give land away this way,' and she didn't dare to speak for fear of Kahilina;" Mika, as she says, being outside all this time. Nor did she converse with him about the deeds after she left the house. Mika asked her why she was crying and she told him that her brother-in-law had driven her out of the house, but said nothing about these papers that the witness could remember. She later on recollected that Kahilina first offered her three acres, but she "cried and went out because it was too small and Mika then spoke to Kahilina that you best give her three acres more and they offered me three acres more and that is how I got the three acres." Further on her testimony added that in the talk about the 150 acres that her sister wanted to give her and Kahilina objected to, he "got mad and said she was crazy and a bad woman and laid his hand on her,—assaulted her." At a later time she got the deed of her six acres from Kahilina in the presence of Ana Kini, when no conversation occurred. "She might have thought I ought to be satisfied with these six acres. She perhaps dare not say anything for fear of Kahilina." Kahula's evidence is not sufficient to show duress or undue influence. It must be remembered that the Hawaiian language is not capable of being exactly represented by English. For instance, the words translated as used by Kahilina to his wife might well be equivalent in English to his remonstrating with her in strong terms and telling her that it would be a crazy thing for her to do to give the sisters 150 acres apiece.

It is observable that it was only upon cross-examination that Kahula testified to her sister's expression of a wish to give her 150 acres, and to Kahilina's abusive language. No question was asked by the plaintiffs' counsel, which indicated that they relied upon this evidence or expected it.

We have then to consider what reliance to place upon Mika's testimony, and whether to regard it as corroborated to a certain extent by that of Kahula. According to him he had known Ana Kini for five years before her marriage to Kahilina, who was a friend of his, and he also knew her family. He guesses she was 85 years old in January, 1890, when, he says, "she was very weak and feeble. Her physical condition was very poor;" that "whenever she would hear Kahilina coming then she would take fright and shake with fear;" that he thought at that time "she had very poor mentality; that her condition was very poor; that when you would converse on any subject with her she would change the subject very frequently, like a little child, as near as you can say,—childish;" that Kahilina told him he "would like some paper made out—deed between his wife and him." Mika then, he says, told him that his wife could not deed to her husband but that it might be done by deeding to a third person who would deed it back to him; then, said Mika, "If you want to do that, you better find some responsible third person," Kini being present at the talk. Two or three months later he says he received four letters in succession each week from Kahilina saying, in the last letter, "He wanted me to go over very much as he had thought the matter over about the third person we talked of" and thought "I was the best one he could think of." He then went over to Waipakea where Kahilina said the same thing, telling him that he wanted him to make out the papers that way and that he didn't want "one bit of the property to go to any of her relatives," whereupon, says Mika, "I refused to; I said I would not agree to that because it is proper that you would let her give some of her property to some of her relatives." Kahilina then said, "If that is the case let them have one acre." Mika then said, "You better have a talk with your wife; you and she talk this matter over and agree on how much

you are going to give her relatives." Mika then retired and shortly after returned finding, he says, Kahula outside of the house who was crying because, as she said, she went in to see Kini "and Kahilina didn't like to have me go to see Kini and drove me out." Mika went inside, asked them if they had come to terms, and as neither spoke, he said to Ana Kini, "How is this? You better give some of your property to some of your relations and *don't be afraid of him,*" pointing to Kahilina. Then Mika said that he asked her, "How is this; what have you agreed to do? And she went to say that I agreed to give 150 acres, but she had no sooner got it out until Kahilina turned to her and said to her, you brute, you bad woman, what business have you to say that, I don't want you to give your people anything whatever. I didn't marry you for anything but your property and I am at a loss if you are going to do that way. I am a young man and married an old woman like you and I am not going to give my young body to you, an old woman, for nothing." Then, says Mika, "Kahilina said to me, you make out that paper immediately, because (to Kini) you are nearly dead. If you don't agree to this paper being made out this way I know what I will do with you." He says he "noticed Kini was shaking and quite frightened and I told her to stop, and suggested, how about ten acres, and at that Kahilina said it better be six," asking Ana Kini how that would suit her and "She nodded her head in affirmation." To the question whether the woman had any lawyer to look out for her and whether any was suggested, the answer was "No." To the question whether "anything was suggested at that time by anybody that an attorney or some outside friend should be got to speak and act for Ana Kini in this business," the witness replied, "I suggested it myself, and Kahilina said he could attend to those things himself. Kahilina spoke in a very loud voice, and cross—a cross manner."

If all this evidence of Mika could be taken to be true, the deed of Ana Kini, instead of being her voluntary act, might, perhaps, be regarded as extorted from her by her husband's threat; but Mika, notwithstanding the charge in the bill that

he abetted, and notwithstanding his own profuse expressions of regret for having taken part in what is called a fraud, could not be regarded as participating in the compulsion or duress, for he says he told her not to be afraid of Kahilina. It was Mika, moreover, who says he suggested that provision be made for her relatives and that a lawyer be called in to advise her; but there are reasons why we decline to accept, without qualification, his version of the transaction. According to Mrs. Kanewanui, a distant relative to Ana Kini, her child (keiki), frequently visiting in her family, the husband and wife, in her observation, "lived lovingly with one another." In 1886 she was sent for by Ana Kini who told her, in the presence of Mr. Kanewanui, that she wanted to transfer this land through her to her husband, giving as a reason "that this Kaukau (Kahula), she would wait until Kini was sick and then would come to Kini and ask for a division of the property and ask her to make over some of the property to her, and that in regard to the sister Rebeckah it was the same way," and that "on account of this her husband is the only one that is caring for her and she is coming to the conclusion that the best thing she can do is to make over this property to her husband." Mrs. Kanewanui "refused and told her, you have a number of sisters and grandchildren and you must consider this matter carefully." Her health, according to this witness, was good, as well as her mental condition up to within two months of her death. After hearing from the policeman Kuiki of the deed the witness was at Ana Kini's house and talked with her about it, learning from her precisely what provision she had made for her sisters and the others. At that time she found Kahilina ironing his wife's clothes, as she had seen him do before. After Ana Kini's death Kahilina leased part of the land to the Kilauea Plantation and had stock running on other parts of the land.

Kanewanui fully corroborates his wife's evidence, adding that Ana Kini mentioned as one reason for wishing to make the property over to her husband that she had great affection for him and that her own family "didn't seem to care for her; didn't seem to look after her," and that when she was sick the

sister Kahula "would come, but for no other reason than to ask her for a division of some of the property;" that the sister Rebeckah "would be wandering here and there away from the home and every time she came back all she wants is some of that property." Kahilina, he says, had made five other leases of the land. The Kanewanuis testified for the defendants. Their witness, Horace Crabbe, says he saw Mika in February, 1903, several times, the last occasion being at the Inter Island wharf, when Mika said he was there "on some land case" and that he was "one of the principal witnesses in Kahilina's property, the one who drew the deed;" that he heard Harvey, near by, ask Mika "if she (Kini) was not forced to sign the deed and Mika says, no, it was her own free will;" that Albert Trask had promised him \$50 to change his evidence but had not paid it. Crabbe's wife testified that she was present at the wharf on the occasion referred to and heard Mika say that he was waiting for the \$50 to be paid by Trask to change his evidence about the land sold to Kahilina. Mrs. Kaio, niece of Kahilina, testified that she was intimately acquainted with Ana and her husband; once had lived with them for nine months and again for two weeks, often staying with them over night; that he was "kind to her and she to him. He would often do a little house-work;" that after her father's death in 1875 Kini said, "If your mother would only adopt you to us we would have an heir as we have no children ourselves." After her husband's death in 1889 Kini said, "You left us and got married and your husband is now dead and if you will come here and stay here and look after us we will make this property over to you." "I just simply said, no, I don't care to, and she didn't say anything further."

The evidence of the Kanewanuis and Mrs. Kaio is not disputed, although Mika, while admitting a conversation with Crabbe at the wharf and upon other occasions in Honolulu, is almost sure that he had no talk with Harvey, but did, he says, talk with Crabbe, who told him there was a woman named Kamaka who wanted to talk with him "about these matters;" that "I would get a big sum of money if I was to assist them—

help them in this case;" that he didn't tell Crabbe that the deed from Ana Kini was a good deed. "I wanted always to tell everybody that this deed was not right—was wrong. I admitted that there was a paper made. He asked me if there was and I said yes there was a deed, but nobody asked me about the validity of the deed. I would always tell them the trouble."

Thus, it appears that Kini at an early date considered making the land over to her husband and was unwilling to yield to importunities for the land from her sisters, owing to the care that he took of her and that they didn't care for her when she was ill. The defendants, the plaintiffs objecting, were not allowed to show that the land was not ancestral on Kini's side, but the fact remains that it does not appear that the land came from her side, and although by statute kindred of the half blood inherit equally, there would not be the same moral compulsion on the part of Kini to devise the land to her sisters if it were true that it came to her from her husband's family. Again, by the statute in force, during her married life she could not convey her land to any person without her husband's written consent and he was entitled to the entire income of the land during his life, inheriting one-half of it from her if she had made no conveyance.

The evidence of the notary, Alexander, called by the plaintiffs, who took and certified Kini's acknowledgment of the deed, signed by her in a firm hand and witnessed by him, is that he sat down at a table beside Mrs. Kahilina and that she signed the document before him. His certificate of acknowledgment is in the usual form,—that Kini and her husband separately acknowledged to him that they executed the instrument freely and voluntarily, and that Kini, upon examination by him separate and apart from her husband, further acknowledged that she executed the same without fear or compulsion of her said husband, and that he presumes that the certificate "speaks the truth", as he would not have signed it "if it had not spoken the truth;" although Mika says that Alexander had no interpreter; that it was he who told him what the deeds were, he then saying, "It is all right if you have made out papers from Ana Kini

to you and from you to Kahilina. It is all right. It is well enough." We cannot regard the notary's certificate as untrue simply because he does not remember more definitely than he stated, but Mika's attitude is thoroughly unsatisfactory and, under all the circumstances of the case, we are not willing, upon his testimony, to affirm the decree setting aside the deed.

The harsh language used by the husband to his wife, however reprehensible and uncalled for, was such as often is used by the class to which these people belonged and not infrequently by those in higher walks of life, and it need not be regarded as coercive in the sense of dominating the wife's will. There is no evidence of her cruel treatment by him, but only of kind acts. There was no concealment of the transaction. The deeds were promptly recorded, a sister was present when they were decided upon, Mika was no confederate in a plot to overpower or mislead the wife.

Perhaps the strongest objection to sustaining the bill is the delay of bringing suit during Kahilina's lifetime. We have before us a draft of a bill in equity by the plaintiff Trask and Kini's two sisters, Lapeka and Kaukau, against Kahilina and Mika to set aside this deed on the ground that it was procured "by fraud, constraint, compulsion, wilful misrepresentation and fraudulent concealment of the facts" and that Kini at the time was "about 80 years of age and enfeebled both in mind and body and was, furthermore, ignorant and illiterate." This bill was prepared, according to the testimony of Achi, who drew it, at the request of the plaintiff Trask, who, in his examination, had testified that he never heard of the deed from Kini to Mika or Mika to Kahilina until he learned it from Mr. Dunne, attorney for the plaintiffs, in the year 1903; that he never engaged or retained Achi to bring suit for himself to set aside the deed, nor consulted Achi as an attorney for that purpose. Achi, however, subsequently testified that Trask wanted him to prosecute this case but that he "failed to find evidence to support the allegations of the bill at the time;" that he wrote to Mika to tell him what he knew about the case, having been made to believe at first that he would be a witness for the plaintiffs, but

"his answer discouraged me. He refused to tell me anything about the case;" that he then told Trask, "If I can't get Mika or anybody, I would not file the bill;" that he sent Trask to Kauai "to turn Mika on our side. He went down and he said he could not get it."

Certainly Mika had long known that the plaintiffs wanted his evidence if he could testify against the validity of the deed. He says that he received Achi's letter and told Kahilina that he ought to answer it, the latter saying, "No, don't you answer this letter; let them find out for themselves." He thinks that if he answered, it was "this way,—screening the facts and not telling the truth;" doing so "out of pure friendship—love for Kahilina." He denies that Trask promised him \$50, or that he told Crabbe so. He thinks that he might have said that his expenses going to Honolulu and back amounted to \$50, that Trask paid. He gives as his reason for keeping the matter secret during Kahilina's lifetime that the latter was his particular friend, but since his death "I have been anxious to tell it ever since because I see I have wronged those people of Ana Kini." His conscience, he says, had troubled him only after Kahilina died and would not let him rest, "but the minute he died the whole secret is upon me and I feel that I had deprived, or would deprive these people who were the owners of this property and the whole trouble is upon my shoulders now since his death." Again, "While he was living the blame was on his own shoulders but since he died it came on me." Then he says, "I knew that the time would come when I should wash my hands of this." Referring to the time shortly after Kahilina's death when Sam Keanu and Pukalo went to Koloa to see Mika about the matter, he says, "It seems that Providence had sent them; that the time had come to wash my hands of this dirt and it seems that the Almighty had sent them there at that time." Mika's silence after the deed was executed until several weeks after Kahilina's death, a period of some twelve years, is not, in our opinion, sufficiently explained by his statement that it was out of regard for his friend. He seems to us to protest too much when he speaks of his troubled conscience and that he

was glad at last to divulge the facts. Well knowing the wish of the relatives to get the benefit of his evidence, he waited until they sent to him for the information which he had refused to give during Kahilina's lifetime; then he became a ready and willing witness. We do not fully rely on his evidence notwithstanding the important fact that the learned circuit judge took it to be true. The changing or omitting of a few words in the language which he says the husband used to the wife would leave the plaintiffs' case without any basis whatsoever. The suggestion, which he says he made to Kahilina, to call in the family for conference about the transaction, was uncalled for; they were represented by the sister Kahula. No one could have given her more independent advice than, as he says, he himself gave. His testimony gives us the impression that he really had nothing to tell which would add to the facts known to Kini's sister during the lifetime of herself and husband.

Decree appealed from reversed, bill dismissed.

J. J. Dunne, J. W. Cathcart, (J. D. Willard on the brief) and *C. H. Olson* for plaintiffs.

C. W. Ashford (J. M. Kaneakua with him on the brief) and *W. A. Kinney* for defendants.

MRS. W. L. WILCOX v. E. E. HARTMAN.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED MAY 7, 1906.

DECIDED MAY 11, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

HUSBAND'S LIABILITY ON WIFE'S EXPRESS CONTRACT.

A wife as well as any other person may act as her husband's agent and if as his agent she hires a house for both at a fixed rent, he is liable for the rent irrespective of his legal liability to sup-

port her. In this case the plaintiff's evidence is held sufficient to show *prima facie* that the express contract was made by the husband himself or was authorized or ratified by him if made by her and hence a nonsuit should not have been granted.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for the rent of a furnished house of two rooms at the rate of \$25 a month. At the close of the plaintiff's evidence, which consisted of the brief testimony of the plaintiff alone, the magistrate granted a nonsuit upon the motion of the defendant, and the question is whether he erred in doing so.

The argument in support of the nonsuit is substantially that the declaration is upon an express promise by the defendant to pay at the rate mentioned while the proof is of a similar promise on the part of the defendant's wife. The plaintiff contends that the husband is legally liable for necessities furnished to the wife. The defendant does not dispute this or that the husband might be liable for the use and occupation of the premises by himself on an implied contract irrespective of his obligation to support his wife, but contends that in either case he would be liable only for the reasonable value of the use of the house and not upon an express promise made by the wife for a definite rental.

It will be unnecessary to consider the legal obligation of the husband to support the wife, which is sometimes said, though inappropriately, to constitute her his agent for the procurement of necessities for herself. The wife may be made the actual agent of the husband either expressly or by implication just as any other person may be, and within certain limits or for certain purposes less is required to show an authorization or ratification of a promise made by the wife than is required in cases of other persons, for it is natural and customary and indeed to a large extent necessary that certain matters should be left to and looked after by the wife.

In this case the minutes of the testimony may be imperfect owing to condensation and it may be that the testimony as act-

ually given would support the nonsuit, but we must take it as it appears in the record, and although it is ambiguous in some respects it, in our opinion, does not taken as a whole support the nonsuit. It is true that the plaintiff testified that she "had business transactions with Mrs. Hartman to board at my house at Waikiki," and, on cross examination, that "Mrs. Hartman agreed to pay rent \$25 a month," but it appears that she had transactions with Mr. Hartman also and apparently he was the first to see her about renting the house. "Mr. Hartman came to my house, he wanted house for his wife and himself." The dealings seem to have been with both of them. "I gave them the house \$25 a month. They paid me \$5 on the day they moved in. * * * They said they will pay the rest by and by. * * * It was on October 27 when they moved into my house. They stayed there in January. They went out first part of January. I asked defendant to pay. They moved quick. I asked the wife to pay." Mr. Hartman lived there during the whole period with his wife. After the first payment of \$5 already mentioned, he paid three other small amounts aggregating \$14. This is not the case of a wife living apart from her husband or even a case of a wife living with her husband and procuring necessities or other things for herself without his knowledge. The evidence tends to show that Mr. Hartman as well as his wife took the house on the understanding that the rent was to be \$25 a month and that in any event he authorized or ratified a promise to that effect if made by her alone. Credit was not given to her alone. A prima facie case was made out which it was the duty of the defendant to meet by evidence if he could.

The judgment is reversed and the cause remanded for further proceedings.

A. G. Correa for plaintiff.

Thompson & Clemons for defendant.

IN THE MATTER OF THE ESTATE OF JAMES LOVE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 30, 1906.

DECIDED MAY 17, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TRUSTEE—*counsel fee of paid by whom.*

Under a trust deed authorizing a trustee to pay all charges and expenses connected with the property conveyed, and directing it to pay the net income to L. for life, remainder to L., Jr., and H., an order allowing the trustee to deduct out of the income an attorney's fee of \$100 for services in connection with an application by L. for an allowance of \$600 in addition to the net income, L. admitting that the fee is not unreasonable and that the trustee should not be required to pay the fee out of its own funds, is affirmed.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from an order authorizing the Henry Waterhouse Trust Co., Ltd., the trustee under a certain deed of trust executed by James Love on August 28, 1901, to deduct and pay out of any funds in its hands, being income on the property belonging to the estate of James Love, an attorney's fee of \$100 for services in connection with a petition filed by James Love for an allowance of \$600 in addition to the net income. After the petition was filed various proceedings were had, terminating in the overruling of a demurrer by James Love to a plea in abatement by Annie K. Hart and James Love, Jr. The plea in abatement set up the pendency of an appeal in the case of *Love v. Love*, ante, 206, which was a suit to cancel the trust deed referred to.

That the amount of the fee is not unreasonable and that the trustee should not be required to make the payment out of its own funds are propositions that are admitted by the appellant.

It is contended by him, however, that the fee should be paid out of the principal and not out of the income of the estate, and that is the sole question to decide. He claims that as the benefit of these proceedings inured solely to Annie K. Hart and James Love, Jr., the ultimate beneficiaries, they should be required to pay the fee of the attorney for the trustee, that is, that it should come out of the principal rather than the income of the estate. On the other hand, the appellee contends that, as this is an ordinary expense of administration, it should be paid out of the income rather than the principal, especially as the one entitled to the income was the moving party and caused the expense.

The trust deed in question conveys certain property to Annie K. Hart and James Love, Jr., certain other property to Annie L. Roe, and what is now referred to as the balance of the estate of James Love to a trustee who was to have the sole management and control of it with power to collect the rents, issues and profits thereof and pay all "charges and expenses connected with the said property"; to sell certain of the property on certain conditions, to invest proceeds of sale, and to vary such investments; and, finally, to "pay the net income, rents, issues and profits from the said property and investments to the said James Love for life," and upon the death of James Love to convey the property and its proceeds or the investments to Annie K. Hart and James Love, Jr.

In *Love v. Love*, ante, 206, it was held that the claims of James Love (1) that the trust is void for indefiniteness, ambiguity and uncertainty, or (2) that the conveyance is a testamentary disposition of property, or (3) that the conveyance is revocable upon the alleged facts, cannot be sustained. It is claimed that in this proceeding is a showing of facts, in addition to those set out in that case, which might, on the strength of these additional facts, entitle James Love to revoke and cancel the trust deed, and for that reason this attorney's fee should be charged to the principal and not to the income. But these additional facts cannot be considered in this connection because this is not a suit to revoke the trust deed. Certainly in this

proceeding the trust deed cannot be revoked and canceled whatever the facts are, and it is difficult to see how the court can do indirectly what it cannot do directly.

So we come back to the main proposition, namely, whether the principal or the income of the estate should stand this attorney's fee. That under ordinary circumstances the fee is a charge or expense in connection with the property, which the trustee is expressly authorized to pay, and, under the terms of the trust deed, to pay out of the income of the estate, would probably not be denied. But because this proceeding inured solely to the benefit of others than James Love he says that those others should pay the fee. That might be so from an equitable standpoint, were it not for the fact that James Love himself was the moving party in the matter and caused the expense in question. Had James Love made no attempt to secure a part of the principal of the estate, this expense would not have been incurred, and he could also have avoided the whole expense by bringing in all the necessary parties at the beginning of the proceeding.

On the whole, we cannot find that this fee for the trustee's counsel should be paid out of the principal of the estate. As pointed out in *Wordin's Appeal*, 71 Conn. 531, evidence would have been pertinent to show that the expense should not have been incurred at all or at least should not have amounted to as much as \$100, but none such was offered.

The order appealed from is affirmed.

H. E. Highton for James Love.

A. G. M. Robertson for trustee.

IN THE MATTER OF THE APPLICATION OF AKAMU
FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

SUBMITTED MAY 7, 1906.

DECIDED MAY 17, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

HABEAS CORPUS—sentence not void though arrest made illegally.

The want of a warrant, if one were required, in making an arrest would not deprive the trial court of jurisdiction so as to make its sentence void, and the prisoner after sentence is held under it and not under the original arrest and therefore is not entitled to a discharge on habeas corpus.

Id.—hard labor improperly included in sentence or mittimus.

The improper inclusion of "hard labor" in a sentence or mittimus which directs imprisonment upon failure to pay a fine does not make the sentence or mittimus void so as to entitle the prisoner to a discharge on habeas corpus.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from a refusal to issue a writ of habeas corpus on the petition of one Akamu, who was imprisoned upon his failure to pay a fine of \$140 and costs amounting to \$3 imposed upon him by the district magistrate of North Kona for selling spirituous liquor without a license.

Passing by the preliminary questions whether an appeal lies from a mere refusal to issue the writ, especially in a case in which by the terms of the statute the writ is not issuable as of right, and whether, if an appeal lies, it should be entertained when, as in this case, it does not appear that the petitioner is still imprisoned, and the time allowed by law for working out the fine and costs would in natural course have expired long since, we are of the opinion that the issuance of the writ was properly refused.

Only two grounds are relied on to show that the petitioner was unlawfully imprisoned. The first of these is that he was arrested and brought before the district magistrate for trial without a warrant of arrest. Assuming, what does not appear, that this was a case in which the arrest would be unlawful if made without a warrant, the want of a warrant would not deprive the magistrate of jurisdiction so as to make his judgment and sentence absolutely void and subject to collateral attack, and the petitioner at the date of his petition was held under the sentence and not under the original arrest. It may be added that it does not appear that any objection was made before the district magistrate on the ground that there was no warrant or that the petitioner did not voluntarily submit to the jurisdiction of the magistrate. In any event this is not an appeal or writ of error for the correction of errors made by the magistrate. It is a petition for a writ of habeas corpus based on the theory that the sentence of the magistrate was absolutely void.

The second ground is that the imprisonment was to be at hard labor according to the terms of the former statute, which was amended so as to prohibit hard labor in cases of this kind by Act 33 of the Laws of 1905, which became law twelve days before the sentence was pronounced by the magistrate. Probably the magistrate had not then learned of the new law or else inadvertently omitted to strike out the words "hard labor" from the printed form of the mittimus. It does not appear, however, by the petition that the petitioner was subjected to hard labor in fact or even that the sentence or mittimus required hard labor. On the contrary it is alleged that he was sentenced to pay the fine and costs "or in default thereof to be imprisoned as by law provided," which would mean without hard labor. There is, however, among the papers sent up what purports to be a mittimus in the case containing the words "hard labor." If we may notice this, we must still hold that the petitioner was not entitled to a discharge. The sentence, even if the clause in regard to imprisonment is regarded as a part of it and not merely a declaration in the mittimus of what is required by law whether included in the sentence or not, is not abso-

lutely void. The words "hard labor" may be regarded as surplusage or void as in excess of the authority of the magistrate and might be struck out by the magistrate or an appellate court, that is, the sentence or mittimus might properly be amended in this respect, but it is not utterly void so as to entitle the petitioner to his discharge on habeas corpus.

The appeal is dismissed.

H. T. Mills for petitioner.

M. F. Prosser for respondent.

IN THE MATTER OF THE APPLICATION OF EMILY, MAGGIE, EDDIE, HERBERT AND EVA RODRIGUES, BY THEIR NEXT FRIEND JOAQUIM GARCIA, FOR A WRIT OF MANDAMUS AGAINST V. O. TEIXEIRA, J. R. MONIZ, A. G. SILVA, J. G. COSTA AND J. F. ROZA, DIRECTORS OF THE PORTUGUESE MUTUAL BENEFIT SOCIETY OF HAWAII, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

SUBMITTED MAY 7, 1906.

DECIDED MAY 17, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

WITNESS FEES—*not allowed, when witness is a party.*

A witness who is a party is not entitled to mileage and attendance fees—at least when it does not appear that he attended solely as a witness.

ATTORNEY'S FEES—*allowed in chambers as well as term cases.*

The provisions of R. L., Sec. 1889, allowing attorneys' fees apply to cases before circuit judges at chambers as well as to term cases in the circuit courts proper.

OPINION OF THE COURT BY FREAR, C.J.

The petitioners appeal from so much of the final judgment or decree dismissing the petition as taxes to them costs in the

sum of \$92.50, consisting of \$18 mileage and \$3 attendance fees for each of four witnesses subpoenaed by the respondents and \$8.50 attorney's fees for drawing demurrer, serving a copy thereof on opposite counsel and attendance upon the trial and upon the taxation of costs.

The respondents make a preliminary objection that the appeal does not lie on the ground that it is from an interlocutory oral order taxing costs on June 29, 1905, and not from the final judgment or decree entered October 26, 1905. We do not so understand it. It is true the appeal is from the "order made * * * taxing the costs," etc., but the judgment or decree entered October 26 was such an order although it contained other matter also, and there is no other order entered taxing costs or even a reference in the record to an oral order to that effect. Moreover, the appeal bond refers to the "judgment entered" and recites that the appeal is from "said order in so far as it pertains to the taxation of costs," etc. The appeal and the bond also were filed just within the time allowed if they were intended to refer to the judgment that was entered, namely, on the 5th and 9th days after the entry.

The petitioners contend that mileage and attendance fees should not be allowed for three of the witnesses, who were respondents in the case. This contention must be sustained. The general rule is that parties should not be allowed such fees—not only when they are interested parties but also when they are parties in a merely representative capacity, although persons interested may be allowed such fees if they are not parties. In some cases this rule has been relaxed to the extent of allowing such fees to parties attending solely as witnesses on behalf of co-parties, and in some cases even to the extent of allowing such fees to parties appearing solely as witnesses for themselves, but in such cases it is held that the facts must be clearly established and in the latter case it is held that the fact that a party attends solely as a witness for himself and that he would not attend as a party or otherwise except as a witness must be shown by his own affidavit, for no one else can swear

to such fact. See 11 Cyc. 114 and notes; 13 Cen. Dig., Title, Costs, Sec. 724. In the present case no such showing was made. The three witnesses were parties and they were the only respondents who appeared at the hearing. They were subpoenaed to testify as witnesses on the part of themselves as well as of their correspondents.

The mileage and attendance fees of the fourth witness, who was the secretary of the corporation but not one of the directors and not a respondent in the case, were properly allowed.

The attorney's fees also were properly allowed notwithstanding *Spreckels v. Giffard*, 10 Haw. 462, in which the question whether the provisions of what is now section 1889 of the Revised Laws relating to attorney's fees applied to chambers cases as well as to term cases was suggested but left undecided, because counsel practically admitted that those provisions did apply to chambers cases, and *Willard v. Vincent*, 13 Haw. 237, and *Hong Kim v. Hapai*, 13 Haw. 328, in which it was held, without stating reasons, that those provisions did not so apply, but were confined to term matters, and that another section, which is omitted from the Revised Laws and which does not include attorney's fees, applied to chambers cases before the circuit judges. Act 44 of the Laws of 1905, enacted since those cases were decided, in its body purports to make section 1889 of the Revised Laws applicable to all cases at chambers, although its title refers to equity cases only. The present case is a mandamus case. This act was not referred to by counsel on either side, and because of the doubt, if nothing more, as to its validity so far as mandamus cases are concerned, owing to the variance between its title and its body, and because our conclusion would be the same irrespective of this act, we will base the decision on this point upon other grounds. What is now section 1889 of the Revised Laws, although entitled "circuit and supreme courts," has been applied in practice, except perhaps as to attorney's fees and except in one of the circuits, to chambers cases as well as to term cases since the enactment of the judiciary act of 1892. If it applies as to other matters it applies as to attorney's fees also. In a certain sense the courts

of the circuit judges and supreme court justices sitting in chambers may be considered as merely branches of the circuit and supreme courts proper, and have often been referred to in that sense. See *Kendall v. Holloway*, 16 Haw. 45; *Carter v. Judge*, 16 Haw. 242; *Id.* 412. This section was applied also in matters before the supreme court justices at chambers prior to the judiciary act of 1892, when the supreme court justices at chambers occupied practically the same status as has since been occupied by the circuit judges at chambers. The other section referred to, omitted from the Revised Laws and entitled "In trials at chambers before the circuit judges," related to circuit judges under the old system when such judges occupied a status very different from and inferior to that of the present circuit judges. The effect of the judiciary act of 1892 was to elevate the status of circuit courts and circuit judges in matters within their jurisdiction to that formerly occupied by the supreme court and the justices thereof in such matters. See *Republic v. Tokuji*, 9 Haw. 548. If section 1889 did not apply to matters before supreme court justices at chambers there would be no provision for costs in such matters, contrary to the general understanding, and if that section applies to matters before supreme court justices at chambers it applies equally to matters before circuit court judges at chambers.

The judgment or decree appealed from is modified by reducing the costs allowed from \$92.50 to \$29.50.

J. M. Vivas and *A. G. Correa* for petitioners.

E. C. Peters for respondents.

J. A. MAGUIRE v. FRANK GOMES AND JOSE
HENRIQUES.

APPEAL FROM DISTRICT MAGISTRATE, NORTH KONA, HAWAII.

SUBMITTED MAY 7, 1906.

DECIDED MAY 17, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

FIXTURES—*water tanks connected with roof gutters from house.*

Water tanks resting on posts and connected with gutters upon the roof of a house by spouts or pipes nailed to them are not removable by a tenant under a lease for a stated term after the expiration of the term, the premises meanwhile having been leased to the defendants, the plaintiff's lease containing a covenant to yield up the premises at the end of the term with all erections, buildings and improvements placed upon the same.

OPINION OF THE COURT BY HARTWELL, J.

Plaintiff's action was to recover \$125, the value of two water tanks alleged to have been converted by the defendants to their own use under the following circumstances:

In 1893 the plaintiff put the tanks, then worth about \$125, on land which he thought was his own but which was government land included in a lease of 5400 acres which he obtained July 24, 1894, for a term of ten years, afterwards extended one year, terminating July 24, 1905, at an annual rental of \$50. He placed the tanks on posts, connecting them by pipes with gutters on the roof of a house in order to catch and hold the rain water. His lease contained a covenant that at the end of the term he would "yield up to the lessor or his successors in office all and singular the premises hereby demised with all erections, buildings and improvements of whatever name or nature now on, or which may be hereafter put, set up, erected or placed upon the same in as good order and condition in all respects, reasonable use, wear and tear excepted, as the same are at present or may hereafter be put by the lessee."

At the end of the plaintiff's extended term the defendants took possession of the premises under a lease from the government of January 10, 1905, for a term of twenty-one years from July 29, 1903, at an annual rental of \$610, finding the house and the tanks upon the premises. In the following September the plaintiff made demand upon the defendants for the tanks, offering to remove them. The defendants refused to comply with the demand. The magistrate gave judgment for the defendants, holding that under the lessee's covenant above mentioned he could not remove the water tanks after the end of his lease. Upon this ruling the plaintiff appealed from the judgment.

The plaintiff claims that the way in which the tanks were connected with the house and the use which was made of them did not change their character as personal property or make them an improvement of the realty and that as they were removable without injury to the realty their usefulness to the occupants of the house was immaterial; that they were no more to be regarded as annexed to the realty than if they were hogsheads placed under the eaves to catch rain water running from the spout.

The defendants' claim is that the tanks were "necessary adjuncts to the house" which depends upon rain water for domestic uses and that being connected by spouts from the roof gutters nailed to them they became part of the house which, under the lessee's covenant, could not be taken away; and that if the plaintiff could have removed them during his term he could not do so several weeks after.

Whether or not, without breaking his covenant, the plaintiff could have taken the tanks away when he left at the end of his term, he cannot do this afterwards. The defendants were entitled by their lease to the use of the house and the tanks connected with it as appurtenances and the plaintiff has no more right to the tanks than to the house itself.

The judgment appealed from is affirmed.

G. F. Maydwell for plaintiff.

H. T. Mills for defendants.

HAWAIIAN CARRIAGE MANUFACTURING COMPANY, LIMITED, A HAWAIIAN CORPORATION,
v. SCHUMAN CARRIAGE COMPANY, LIMITED, A
HAWAIIAN CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 1, 1906.

DECIDED MAY 21, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

AGREEMENT IN RESTRAINT OF TRADE—*whether illegal by Sherman Act of July 2, 1890, if good at common law.*

The plaintiff and the defendant agreed upon the purchase of the stock in trade of another company under an option obtained by the plaintiff, certain of the stock, including vehicles, being taken by the defendant and the rest, including rubber tires, by the plaintiff; the defendant was to turn over to the plaintiff for five years its trade in certain of the articles bought, not including vehicles, and be allowed as commissions one-half of the profits on rubber tires which it was not to sell at prices less than those set by the plaintiff, while the plaintiff was not to sell during the five years new imported vehicles. Held: The agreement was good at common law, its main object being not to restrain the trade or prevent the competition of either party and it was not illegal under the provisions of the Anti Trust Act of July 2, 1890, applicable to Territories.

Id.—*corporations—pleading—jurisdiction in equity for accounting.*

The agreement, not being void or illegal, was not ultra vires and was not an abrogation of corporate functions. Although averments of agency, partnership or fiduciary relations between the parties, averred in the bill, are not shown by the agreement and the bill does not sufficiently aver mutual accounts a case for accounting is shown. Sec. 1834, R. L.

OPINION OF THE COURT BY HARTWELL, J.

This is an appeal by the plaintiff from a decree sustaining the defendant's demurrer to the plaintiff's bill and dismissing the bill.

The parties had agreed with each other (1) that if the plaintiff should purchase from the Pacific Vehicle and Supply Company, Ltd., of Honolulu, its stock of merchandise or a portion thereof the defendant was to buy from the plaintiff "all the vehicles, harness and saddlery goods, lamps, whips, robes, blankets and accessories" that the plaintiff might acquire from the Pacific Co., paying the plaintiff such sums of money as it might have agreed upon with the Pacific Co., and (2) its (the defendant's) proportion of the expense of inventorying and transferring the stock and such other expense as might be incurred by the plaintiff "in effecting such sale, inventory, transfer," etc.; and (3) agreeing to give to the plaintiff "all of his trade in rubber tires, carriage hardware, trimmings and materials, paints, varnishes, etc., and to continue to turn over such business for the term of five years;" and (4) "not to sell rubber tires at a price lower than set" by plaintiff; (5) the plaintiff agreeing to "allow" the defendant "a commission equal to one-half its profits on all rubber tires purchased by or through" the defendant, "such commissions to be due on settlement of the account;" and not to sell in Hawaii "new imported vehicles during the term of five years."

The bill avers that at the date of the agreement, March 20, 1903, the plaintiff had an option for the purchase of the Pacific Co.'s stock, a portion of which the defendant desired to purchase and made an offer to the plaintiff that if it would buy the whole of the stock or a portion thereof and sell to the defendant its trade and business in new imported vehicles and good will therein the defendant would buy from the plaintiff the vehicles, etc., and sell to the plaintiff the defendant's trade and business in rubber tires, carriage hardware, trimmings and material, paints and varnishes "and things pertaining to the carriage manufacturing and repair business, and defendant's good will in said trade and business;" that the plaintiff thereupon purchased the stock of the Pacific, etc., Co. at an expenditure of \$9,915.43 "above the value of that portion of said stock which defendant agreed to take," doing this in reliance upon the defendant's promise to give the plaintiff its trade in rubber

tires "for which there had become at said time a greatly increased demand;" that the plaintiff entered into the agreement in consideration of the defendant's sale to the plaintiff for five years of defendant's trade and business in Hawaii in rubber tires, carriage hardware, trimmings and materials, paints, varnishes, etc., together with defendant's good will in the trade and business, and that the plaintiff "for other good and valuable consideration, as hereinabove set forth, sold to defendant for said term of five years plaintiff's trade and business within the Territory of Hawaii in new imported vehicles, together with its good will in said trade and business."

"That as ancillary to said agreement, to protect the respective rights of the parties thereunder, and to save to said parties the respective rights for which they had bargained as aforesaid, it was mutually agreed that neither party should for said term engage in the trade and business which it had respectively sold to the other, and that each should turn over to the other all its trade in said articles and things the good will wherein was sold by the respective parties as aforesaid.

"That by said agreement it was stipulated that although defendant was not to deal in rubber tires independently and on its own account, yet defendant was authorized to sell rubber tires as the agent of plaintiff, and was to receive as plaintiff's agent in compensation for such sales, a commission equal to one-half of the profits thereon; and further that in all such sales of rubber tires plaintiff was to fix the minimum price."

That the defendant paid \$5,000 for the portion of the stock which it took and also its share of the expense of inventorying, etc., but otherwise has not performed its agreement and has carried on an extensive trade in rubber tires and neglected and refused to account to the plaintiff for sales thereof or to turn over to the plaintiff its share of the profits from the sales thereof and, in further disregard of its agreement, has dealt in carriage hardware, trimmings and materials, paints and varnishes and other things pertaining to the carriage manufacturing and repair business and refused to perform the agreement "in respect of the good will and trade" therein and "to account to plaintiff in respect to said matters;" that in consequence of the defendant's default the plaintiff has on hand a

large amount of the goods and material purchased by it of the Pacific, etc., Co., which it is unable to dispose of but would have disposed of had the defendant turned over its trade to the plaintiff; that in further violation of the terms and spirit of the agreement the defendant has bought out the carriage repair and manufacturing and rubber tire fitting business of the Murray Carriage Company in Honolulu and is carrying on the business on its own account to the plaintiff's damage; that the defendant has become liable thereby to the plaintiff for large sums of money for which it ought to account to the plaintiff, the amounts of which cannot be determined without an accounting and discovery, but which the plaintiff avers on its information and belief to amount to \$200 a month since the date of the agreement, and that by reason of the defendant's default the plaintiff has been damaged in said amounts, as well as for loss of trade and business in the further amount, averred on information and belief, of \$5,000.

The bill avers that the plaintiff has complied with its under-
ever been and is now ready to account to the defendant "for commissions earned by defendant on account of sales of rubber tires made by or through defendant as plaintiff's agent."

The bill prays for an accounting and an injunction restraining the defendant from breach of the agreement made by it.

The grounds of the demurrer are (1) that the agreement is void because it "unreasonably tends to restrain trade in an article of commerce," and also because it is prohibited by the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies;" (2) that the averment in the bill of the defendant's agency is a conclusion of the pleader from the agreement which does not warrant the conclusion; (3) that the terms of the agreement do not warrant the averment in the bill that the parties sold to each other their respective good wills; (4) that the bill is "nonsensical, absurd and frivolous," more particularly with reference to its averment that "defendant is indebted to complainant at least in the amounts that such accounting can determine;" (5) that the bill is insufficient and uncertain in

its non-avermment that the defendant ever received from the plaintiff for its account, for sale or otherwise, any rubber tires or other goods or how the dealings between the parties involve "the matters and things which form the subjects of said agreement" or how they differ from ordinary mutual accounts between merchants; (6) that the bill is without equity (7) plaintiff having a plain, speedy and adequate remedy at law; and (8) "is inflated with redundant, immaterial, impertinent and frivolous allegations and conclusions of law and fact, wholly unwarranted, inserted in said amended bill for the purpose of stating a case within the cognizance of this honorable court of chancery;" and (9) that it does not appear from the bill that the agreement was entered into by the parties or was obligatory on the part of the defendant corporation.

The object of the parties, as far as the agreement shows, was (1) to acquire the stock in trade of another company, averred in the bill to have been "carrying on its business at a loss and desirous of disposing of the same," availing themselves of the plaintiff's option to purchase the stock, the defendant taking all the vehicles, harness and saddlery goods, lamps, whips, robes, blankets and accessories, and the plaintiff taking the rest of the stock; and (2) to dispose of the stock so acquired and apportioned between them in a way which they deemed to be mutually advantageous, namely, by the plaintiff agreeing not to sell in Hawaii new imported vehicles for five years and the defendant agreeing to give the plaintiff its trade in rubber tires, carriage hardware, trimmings and materials, paints, varnishes, etc., and continue to turn over its business for five years but retaining half the profits on rubber tires and agreeing not to sell them for less than the plaintiff's prices. Neither party sold its good will to the other and it is evident that the defendant was to continue its trade and business and not retire from it and that the plaintiff continue its business, with the exception of imported vehicles.

As pointed out by the defendant, the bill fails to aver that the defendant bought of the plaintiff the portion of the stock, including vehicles which it "took over." We infer that there

was no transfer from the plaintiff to the defendant and no payment of the "\$5,000 worth" made directly to the plaintiff, but that the stock was sold to them separately, the defendant taking those articles which it had agreed with the plaintiff to take and paying the seller therefor the prices agreed upon between the plaintiff and the seller. The defendant thus got the benefit of the prices at which the plaintiff had secured an option. Taking the agreement, then, to have for its ultimate object an advantageous disposition of the purchased stock, and that in order to make the agreement effective it was applied not only to the new purchase but to all their stock in trade whether previously held or afterwards acquired during the agreed term of five years, the question to consider is whether, if the agreement was such as lawfully could be made by these parties under the law of corporations, it was good at common law.

Each of the parties expected to gain by the agreement, by which not only the defendant got the benefit of the option but the plaintiff also was able to take, at the prices agreed upon for the whole stock, those things which the defendant did not take. The defendant, of course, thought that it would sell enough more vehicles and at enough higher rates, if the plaintiff kept out of the carriage business for five years, to more than counterbalance its profits upon the trade in the other specified things, retaining half the rubber tire profits; while the plaintiff thought that the defendant's trade in those things added to one-half the rubber tire profits would more than make good its profits on trading in vehicles for that period of time and that it could well afford to divide rubber tire profits equally seeing that the defendant would not undersell it. The defendant did not restrain itself or the public from trading by giving the profits of its trade to the plaintiff or by conforming to the plaintiff's prices on rubber tires. Whether competition in prices is for the advantage either of buyers or sellers in the long run depends upon many indeterminate and variable conditions. The kind of competition which ruins and drives out of business leaves buyers worse off than ever and accomplishes the greatest restraint upon trade which is practicable, while no rule of com-

mon law requires traders to compete with each other or precludes their agreeing not to compete under some circumstances or conditions.

Was then the plaintiff's promise that it would not sell imported vehicles in Hawaii for five years a legal consideration for the defendant's undertaking or was it opposed to public policy so that the resulting agreement was void? A trader may sell or agree to sell out all his business and stock in trade and as part of the consideration, for which he received value, may, under such limitations of time and space as are deemed to be "reasonable," agree with the buyer not to carry on business in the things sold. Similar restrictions upon trade may be agreed upon by a retiring partner not to compete with the firm; by an employee not to compete with the employer after leaving the employment. "It by no means follows, however, that an agreement in partial restraint of trade must fall within one of these descriptions in order to be valid." Pollock's *Principles of Contract*, 313.

"The admission of limited restraints is commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself or the state of his labor, skill or talent; and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons." *Ib.* 310, citing *Leather Cloth Co. v. Lorsche*, 9 Eq. 353.

The public is not concerned to know whether transactions of this kind are detrimental to those who participate in them or not and properly leaves parties to act according to their own view of what is advantageous to themselves as long as they do or agree to do nothing which contravenes statutory law.

The question recurs whether the plaintiff's agreement is within the reason of the above mentioned classes of agreements,

as required by the promisee for the protection of some right which the promisor has conceded to him, and goes no further than reasonably is required for its protection. It is with reference to this latter condition that the expression "partial or reasonable restraint of trade" is ordinarily used. The plaintiff was to sell no vehicles to interfere with the defendant selling for five years. The plaintiff's promise was in consideration of the defendant's buying the vehicles and other things specified which it agreed to take and which the plaintiff either did not wish or was unable to buy although it wished the benefit of the option prices for the rest of the stock. If the plaintiff had bought the vehicles of the vehicle company and sold them to the defendant its agreement not to deal in them in Hawaii for five years would have been the ordinary agreement between buyer and seller which the law recognizes. The agreement does not appear to have had for its primary object the acquiring control of the vehicle trade to the extent of removing the plaintiff's competition but rather the protection of the defendant's interest in selling the vehicles acquired through the plaintiff, and, to a certain extent, for its benefit. The agreement is not void on the ground that it was opposed to public policy. The plaintiff's agreement not to sell imported vehicles in Hawaii for five years did not unreasonably secure the defendant against its competition in selling vehicles bought under the terms of the agreement. The clauses of the agreement are interdependent, each being part of the general scheme, each party making its several promises in reliance upon each and all the promises of the other party.

Mr. Justice Holmes, in his dissenting opinion in the *Merger* case, said: "Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England.

Mitchel v. Reynolds, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

"Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States v. E. C. Knight Co.*, 156 U. S. 1." *Northwestern Securities Co. v. U. S.*, 193 U. S. 404.

This agreement was not made with a stranger, nor did it seek to keep strangers out of the business.

In reference to agreements limiting competition which accompany business transactions and are good at common law Mr. Justice Brewer, while holding that the *Merger* case was within the Sherman Act, said: "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld." *Ib.*, 361.

In a recent case, decided January 2, 1906, the U. S. Supreme Court upheld a contract by which one party sold to the other certain steamers and other property to be paid for in annual instalments in five years, with a condition that if opposition to the buyer's boats running between certain points should cause low rates, payment of instalments should be postponed until the opposition ceased and that if it continued two years without interruption without annual payment the first party

could cancel the agreement; and further, "as a part of the consideration of this agreement," it was agreed that for five years the seller should not engage or be interested in any freight and passenger business between the points mentioned except the towing and barge business as long as it did not interfere with the other party's freight and passenger business; further, it was agreed that the buyer would maintain the rates charged by the seller on business above a point named, not, however, exceeding railroad rates. This last clause in the agreement was "especially relied upon as making the contract illegal as in restraint of trade," while the suspension of instalments in case of opposition rising to a certain height was "referred to as a combination to aid the purchaser in getting a monopoly of river trade" between the specified points. Of this latter agreement the court said that it was "security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will. * * * It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller, necessary in order to give the sale effect, were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed." *Cincinnati, etc., Packet Co. v. Bay, et al.*, 26 U. S. S. C. Rep. 208.

It is but fair to the defendant's attorneys to say that they do not contest the law which is applicable to the construction which we place upon the agreement, their contention, which we do not sustain, being that its object was to absorb the trade of a rival concern for the purpose of avoiding its competition and to restrict their own trade for the purpose of avoiding mutual competition.

But the defendant insists that whether at common law the agreement was good or bad, reasonable or not, and whatever

its motive or object, it was an agreement which undoubtedly restrained trade and therefore is within the implied prohibition of the Sherman Act which declares all contracts and combinations in restraint of trade to be illegal.

The act does not make it a misdemeanor to "monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of the trade or commerce" of a Territory. Section 2 of the act makes this a misdemeanor only when directed to trade or commerce among the States or with foreign nations. The thing which is made illegal by section 1 in respect "of trade or commerce among the several states or with foreign nations" is, by section 3, illegal in respect of the trade or commerce in any Territory, the section reading as follows:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

With the exception of the cases pending in the federal court in Hawaii we are aware of none which have been brought under this section. The act, in section 3, deals with contracts in restraint of interstate or territorial trade and commerce and, in section 2, with monopolizing or attempts, combinations or conspiracies to monopolize interstate but not territorial trade and commerce. The case, therefore, if treated as an attempt or conspiracy to monopolize trade in Hawaii, would contravene no provision in the act. There being no power vested in Congress to declare a contract in restraint of state trade or commerce illegal or a misdemeanor, section 1 appropriately con-

finds the illegality and criminality therein declared to contracts in restraint of interstate trade and commerce which, unless the United States Supreme Court decisions hold otherwise, we should regard as including only contracts illegal at common law, the act thus accomplishing the object of bringing such illegal contracts under federal jurisdiction.

The defendant bases its claim that the agreement is in restraint of trade on the grounds (1) that it "restrains the corporations from carrying on business which they were each created to carry on;" (2) that "it eliminates competition between themselves," and (3) that "it tends to monopoly" and "enables one corporation to fix the minimum price for the sale of the other corporation's goods" and "deprives one corporation in trade of its full and natural powers in respect to its business of trade and commerce."

We do not recognize the tendency of the agreement to monopolize trade and, as above stated, the act does not concern itself with monopoly in territorial trade; to say that because it restricts the trade of the parties, eliminates their competition with each other, keeps one of them from charging less than the other charges for tires, it therefore is illegal by the Sherman Act although not at common law, is simply asserting that the act makes an otherwise legal contract illegal, which is the question we have to consider.

The United States Supreme Court has repeatedly declared that the act includes legal as well as illegal contracts in restraint of interstate trade or commerce.

In *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, Mr. Justice Peckham, writing the opinion of the court, says: "We see no escape from the conclusion that if any agreement of such a nature does restrain it the agreement is condemned by this act," and that "so far as the very terms of the statute go they apply to any contract of the nature described;" that the "unlawful restraints" named in the title "include those restraints and monopolies which are made unlawful in the body of the statute," and that the act "is not limited to that kind of contract alone which is in unreasonable restraint of trade but

all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." The same case, however, appears to make the exception of "A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale." *Ib.* 329. The minority opinion by Mr. Justice White, Justices Field, Gray and Shiras concurring, after remarking, "It is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law," (p. 344,) and that "from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract they were not in contemplation of law contracts in restraint of trade," continued, "To define then the words 'in restraint of trade' as expressing every contract which in any degree produced that effect would be violative of reason because it would include all those contracts which are the very essence of trade and would be equivalent to saying that there should be no trade and therefore nothing to restrain." (p. 351.)

That case was an agreement between eighteen railroad companies who formed an association and agreed with each other upon the appointment of a committee to establish and regulate traffic rates, fares and charges which the bill charged as an unlawful combination and conspiracy for monopolizing and restraining interstate trade and commerce. Notwithstanding the remark in the minority opinion that it was conceded that this contract did not unreasonably restrain trade, the court, in the majority opinion, says: "The general reasons for holding agreements of this nature to be invalid at common law, on the part of railroad companies, are quite strong if not entirely conclusive." (p. 335.)

The case presented in *U. S. v. Joint Traffic Assn.*, 171 U. S. 505, in which thirty-one railway companies formed an asso-

ciation to have jurisdiction over competitive traffic rates, fares and charges, was held to be substantially the same as the *Trans-Missouri Freight case*. Mr. Justice Peckham, writing the opinion of the court, (Justices Gray, Shiras and White dissenting and McKenna taking no part in the decision,) says of the former case, "There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree" (p. 560); that the opinion of the court in that case "shows that the issue so made (as to the character of the agreement, whether it was or was not one in restraint of trade) was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. * * * To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make the most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court." (p. 568.)

In *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, there were six defendants, one being a company in Ohio, one in Kentucky, two in Alabama and two in Tennessee, which had agreed together upon no competition in the manufacture and sale of cast iron pipe in any of the thirty-six states or territories mentioned in the agreement, the sole object of the agreement being to advance prices and prevent any competition. The court said that "The agreement or combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them" (p. 235), but that the facts "show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable." (p. 238.)

Montague & Co. v. Lowry, 193 U. S. 38, was an agreement between the manufacturers of and dealers in tiles, mantels and grates, the dealers agreeing not to buy from manufacturers who were not members of the association and not to sell unset tiles to others for less than certain prices which were fifty per cent. higher than the prices to members; the manufacturers residing

out of California agreeing not to sell to any but members. This was an agreement which restrained trade by narrowing the market for the sale of tiles in California from manufacturers and dealers in other states "so that they could only be sold to the members of the association and at enhanced prices to the non-member." "The agreement directly affected and restrained interstate commerce," and, we should say, unreasonably so.

In the *Merger case*, Mr. Justice Brewer, referring to the foregoing cases, says, "I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act."

Mr. Justice Holmes, writing the minority opinion, in which Chief Justice Fuller and Justices White and Peckham concurred, held that the case did not show an illegal combination in restraint of trade. He says that the ground of the decision in the *Traffic case*, which followed and affirmed the *Freight case*, was the showing of a "restriction by contract with a stranger to the contractor's business," this being his definition of an agreement void at common law. Clearly, it is because he thinks that those cases showed illegal contracts that he says, "I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restrictions. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger." (pp. 405, 406.)

The *Refineries case* (*U. S. v. Knight*, 156 U. S. 1,) and the *Beef Trust case* (*Swift & Co. v. U. S.*, 196 U. S. 375,) clearly

showed illegal agreements to monopolize trade although held in the former case not to relate to interstate trade.

It is at least doubtful whether the agreements in any of the cases cited except the *Packet Co. case*, supra, were good by general law. In that case, however, the parties had agreed that the seller should cease doing business between certain points for a limited time in order not to compete with similar business by the other party, the buyer agreeing to maintain the same rates as those charged by the seller not exceeding railroad rates. The case is conclusive upon the validity of the present agreement whether at common law or under the act. We consider the agreement to be valid by general law and that under the foregoing decisions it does not contravene any provision of the Sherman Act but belongs to the class of agreements which, as the decisions declare, are not intended by the act.

This ruling disposes adversely of the defendant's contention that the agreement was ultra vires because illegal on any of the grounds mentioned. As to the defendant's claim that neither party could abrogate its corporate functions or permit their control by the other, we do not think that this would be the result of the acts agreed upon. A corporation in its own interests may agree with another for the performance of corporate acts which its charter authorizes it to do itself. For instance, a sugar corporation having by charter the right to do land and water transportation may profitably engage others to perform that service and agree not to do it itself for a specified time; and so of its cane cultivation or milling work.

It is the exercise of discretionary powers which by the corporate "charter, general laws, by-laws, vote of the stockholders or usage is vested in themselves" that directors of a corporation cannot delegate to others; nor can they delegate the "entire supervision and control of the corporation." *Cl. & Mar., Private Corporations*, 2232, and cases there cited. The rule that corporations, unless authorized by statute, cannot form a copartnership or enter into business relations involving partnership liabilities does not affect the agreement between these parties whereby for good and sufficient considerations one of them to

a certain extent limits its trade and one agrees not to undersell the other in an article of the merchandise which was bought under a mutual arrangement.

The defendant, in support of its ground of demurrer that the bill is uncertain, claims that it is not sufficient to aver, as the bill does, the making of the agreement by the parties but that the authority by resolution of the stockholders ought also to be averred. We think the averment is sufficient in view of our finding that the agreement was not ultra vires or illegal.

In passing upon the grounds of demurrer that the case is "without equity" and that the plaintiff's remedy is at law, we are unable to take the plaintiff's version of all the matters averred in the bill. For instance, we find no averment of fact on which the relation of principal and agent or any fiduciary relation between the parties is based or that since the purchase of stock either party has done anything under the agreement unless by their "dealings" together in rubber tires. The bill avers that since the agreement the parties have "had a great number, and almost daily, dealings with each other, and have had and now have running accounts with each other for labor, services, materials and goods, which accounts involve * * * the matters and things which form the subjects of said agreement, and include among other things, mutual dealings in rubber tires."

The existence of mutual accounts in respect of matters not within the agreement is immaterial to the case. If the averment means that in respect of the rubber tires "purchased by or through" the defendant from the Vehicle Co., or elsewhere, it paid the plaintiff part but not all of its profits, there would be no mutual account in them, and we do not infer this to be the meaning of the pleader. The same would be true if he meant that the defendant had bought some tires and failed to pay for them. "The precise legal definition of the words 'mutual dealings' does not seem to have been settled." *Receivers vs. Patterson Gaslight Co.*, 23 N. J. L. 304.

We do not infer from any averment in the bill that the defendant has paid money to the plaintiff with the request that

it be credited to it for account of its business profits or has authorized the plaintiff to charge itself in that account with money owing by it to the defendant. One party cannot make a mutual account. "Where payments on account are made by one party for which credit is given by the other it is an account without reciprocity and only upon one side." *Warren v. Sweeney*, 4 Nev. 101. We take the case as presented by the bill to be that the defendant "has wholly neglected to perform said agreement in respect to the good will and trade in said articles last mentioned and has neglected and refused to account to plaintiff in respect to said matters though often requested by plaintiff so to do." If equity has jurisdiction in this case it is not by reason of any fiduciary relation between the parties but must be based upon the agreement of the defendant to turn over its trade to the plaintiff accepting half its profits on rubber tires as a commission for selling them, the "commissions to be due on settlement of the account," implying that the defendant will account therefor to the plaintiff; and upon the relations established between the parties which, although falling short of making the defendant a partner, agent or trustee of the plaintiff in the ordinary sense of the term, resemble a joint venture for the purchase and disposal of a new stock of goods by a scheme which has some features which exist in partnership cases.

In *Keelikolani v. Robinson*, 2 Haw. 436, there was an agreement in which the half of a wharf in Honolulu was made over to the defendant on condition that he pay one-half of the expense of altering and repairing the same and of all the moneys received for its use; the court, citing *Ewing v. Janion*, 1 Haw. 66, considered that in respect of the accounting "the case comes fully within the powers of a court of equity." In matters of accounting cognizable at law, the general rule is stated to be "that a proper case is presented when the remedies at law are inadequate." 3 Pom., Eq. Jur., Sec. 1420. A suit may be had in equity for an accounting "where the accounts are all on one side and there are circumstances of great complication or difficulties in the way of adequate relief at law." *Ib.* Sec. 1421 and cases cited in note. It rests largely in the discretion of

the court to say whether an accounting is complicated. In *Hawaiian Government v. Brown*, 6 Haw. 750, the accounts were not found to be mutual or complicated. "They are lengthy, it is true, but they could be submitted to a jury and the results reached by them without difficulty." (p. 752.)

In the case before us it would be necessary to ascertain the defendant's profits during the period of three years by a judicial examination and verification of its books and the charges and credits shown by them, requiring rulings upon their propriety or lawfulness,—which would be inconvenient to do in a jury trial. A judge can accept the report of a competent accountant if no error is pointed out, while a jury might require that every item be proved to its satisfaction by original evidence involving difficulties and delays in reaching a final adjustment. A discovery in such cases would facilitate the accounting. The case, we think, comes within the statute giving equity jurisdiction of "Suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." Sec. 1834, R. L.

In the view we take of the case it is unnecessary to discuss the defendant's citations on the subject of jurisdiction although they have received full consideration, having evidently been selected with care. The accounting will be confined to the transactions mentioned in the agreement.

The second, third and fifth grounds of demurrer, which relate to averments not supported by the agreement and to vagueness and insufficiency of other averments, would properly have been sustained at the hearing of the bill with leave to amend, and such averments can be ignored in the answer; but as the bill is good for an accounting the demurrer is overruled and the decree appealed from is reversed with leave to answer over in ten days.

C. F. Clemons (*Thompson & Clemons* on the brief) for plaintiff.

S. B. Kingsbury and *A. S. Humphreys* for defendant.

IN THE MATTER OF THE ESTATE OF S. KAIU,
DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

ARGUED MAY 11, 1906.

DECIDED MAY 21, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ADMINISTRATORS

In the absence of exceptional circumstances an administrator should wind up an estate in about eight months.

Id.—*expenditures without reasonable necessity.*

An administrator will be surcharged with expenditures not shown to have been reasonably necessary.

Id.—*claims of creditors.*

An administrator is not authorized to pay a claim which is not presented according to law. R. L., Sec. 1851.

Id.—*commissions.*

An administrator's commissions may be reduced for neglect of duties.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by Isaac Kaiu from an order allowing the final accounts and discharge of J. H. Coney, administrator de bonis non of the estate of S. Kaiu, deceased, the objection being that several items of expenditure should not have been allowed. Coney was appointed December 2, 1899, and filed his first and final account on March 14, 1905, asking to be allowed \$1058.70 and charging himself with \$1825. On May 4, 1905, the day appointed for the hearing, he filed a supplementary account showing additional expenditures in 1900 and 1902 amounting to \$493.36 and commissions \$159.75 and \$16 for costs on the final hearing. There was also a receipt of \$100 since the filing of the first account, so that the account finally showed a balance due the estate of \$197.19.

Before taking up the items objected to, we may say that the supplementary account of May 4, 1905, showing expenditures of nearly \$500 paid in 1900 and 1902 looks very fishy, in view of the fact that the petition sworn to by the administrator and filed on March 15, 1905, purports to give a detailed statement of receipts and expenditures down to that date.

Furthermore, there appears to be no reason why this estate was not promptly wound up, the administrator discharged and the property distributed to the persons entitled long before 1905. Unless exceptional circumstances prevent an estate should be closed in about eight months. *In re Estate of Espinda*, 9 Haw. 344. All the more should an estate be closed within that time in the case of an administrator de bonis non. The least that an administrator should be compelled to do under those circumstances would be to file an annual account.

The first items objected to amount to \$224, being \$80 paid to George A. Davis for services rendered in court in an action re payment of rent to estate, in the matter of the assignment of mortgage, and in arranging settlement by Podmore for rents in connection with property in Honolulu, \$36 for steamer fare of the administrator, the widow and the son from Kauai to Honolulu and return, and \$108 for expenses in Honolulu in connection with the matter. We allow the \$80 paid for attorney's fees because it does not clearly appear that the expense was incurred without reasonable justification. The other items will have to be disallowed for the reason that the record on this appeal, including the vouchers, does not show any reasonable necessity or justification for the expenditures.

The second objection is to the payment of \$356.38 on February 24, 1903, to Wahine Kaiu, the widow, "in full payment of debts of S. Kaiu Estate to me." The objection is based on the ground that there is no itemized statement of this amount and that it does not appear that any claim for same was filed either with the administrator or with the administrator de bonis non. The administrator contends that it was unnecessary for the widow to file any claim. This item is disallowed, and the administrator de bonis non is surcharged with the amount thereof.

The third objection is to the payment to C. H. Bishop in September, 1902, of \$385.36. The administrator de bonis non testified at the hearing that he knew that Bishop's bill was for lumber, building material, etc., had before the death of Kaiu and used for the benefit of his estate. We do not find any voucher for this expenditure at all, and there does not appear to have been any claim filed for same. The item is disallowed, and the administrator de bonis non is surcharged with the amount. The administrator is bound by the statute, which provides that a claim not duly presented is forever barred and he is not authorized to pay it. R. L., Sec. 1851.

The last objection is to the commissions charged of \$159.75. This objection is based on the ground that as long as the widow's dower remains unsevered she should stand one-third of the commissions. In this case it appears that the widow received in 1900 the sum of \$80 and in 1903 the sum of \$138.15, which purport to be her dower. In view of the fact that the administrator de bonis non did not settle up this estate within a reasonable time, we reduce his commissions to the sum of \$75.

The conclusion is that the administrator de bonis non is surcharged with the sum of \$970.99, with which modification the decree appealed from is affirmed.

J. Lightfoot, (*Magoon & Lightfoot* on the brief), for Isaac Kaiu.

W. T. Rawlins for administrator.

IN THE MATTER OF THE GUARDIANSHIP OF
ISAAC KAIU, A MINOR.

APPEAL FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED MAY 11, 1906.

DECIDED MAY 21, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

GUARDIANS—*accounting*.

Guardians should file annual accounts.

Id.—*maintenance of ward*.

A guardian may be allowed a reasonable sum for the maintenance of his ward, to be paid to the mother, which in this case is fixed at \$15 a month.

Id.—*reasonable necessity of expenditures*.

A guardian will be surcharged with expenditures not shown to have been reasonably necessary.

Id.—*commissions*.

A guardian's commissions may be reduced for neglect of duties.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by one Isaac Kaiu from an order allowing the final accounts and discharge of his guardian J. H. Coney. The guardian charges himself with \$1565.40 and asks to be allowed \$2363.43, leaving a balance due him of \$798.03. The accounts cover a period of over four years down to May 4, 1905, the ward coming of age in March, 1905.

In our opinion the guardian was derelict in not accounting annually. *Guardianship of Long Minors*, 7 Haw. 372.

The first item objected to is the payment of \$1175 to the mother of the ward for his board and lodging, being at the rate of \$25 a month from January 1, 1901, to November 30, 1904, no charge being made for the year 1900 nor for any time after November 30, 1904, the reason for which did not appear. The income of the minor during this period, as shown by the

accounts, was \$1556.65, there being \$208.75 to his credit when the guardian was appointed. An inventory, which is neither sworn to nor dated, shows the minor to own the following property, to wit: 1 piece of land at Niumalu, 3 lots at Waipouli, 4 shares of hui land at Moloaa, an one-half interest in an undivided property in Honolulu, and a leasehold at Nawiliwili. The value of this real estate is not shown. At least two of the pieces of land brought in no rentals. No personal property is listed in the inventory, although it appears in 1902 that a sale of a calabash and a cow realized \$72, and although it appears that for the years 1902 to 1904 inclusive personal property taxes were paid of \$3.65 annually and for the year 1901 \$2.15. In this connection it seems strange that such taxes should be paid when there was apparently no personal property belonging to the minor. Real estate taxes on Kauai amounted to \$19 annually and on Oahu about \$13 annually. The approval of the circuit judge to paying the mother of the boy \$25 a month for his board and lodging was not secured. During this time the boy testified that he earned in the neighborhood of \$200 by fishing. It appeared from the testimony of the mother that they lived simply.

We do not agree with the contention of the appellant that the guardian should not be allowed credits for these payments because the mother was able to support her own son. The correct rule is that a reasonable amount may be allowed for the maintenance of the minor, which amount, in the main, depends on the size of his estate, the style of living he is entitled to, the amount, if any, earned or capable of being earned by his own exertions, and the ability and willingness of his mother to support him. If a guardian, without the approval of the judge, spends more than the income on the maintenance of his ward, he does so at his peril. In view of all the facts in this case, we think \$15 a month a reasonable and proper sum to allow the guardian for maintaining his ward. The guardian is, therefore, allowed to credit himself for the maintenance of his ward from January 1, 1901, to November 30, 1904, the sum of \$725 and is surcharged with the sum of \$450.

The next item objected to is \$150 for a horse which the guardian bought for his ward on the ground that the ward wanted it in order to go out to look for work. Why the guardian should buy a horse for his ward, costing about six months' income, is beyond our comprehension. But we allow the item simply and solely for the reason that the ward still has the horse or the proceeds of its sale.

An objection to an item of \$13.40 for baseball bats, etc., was withdrawn at the argument.

Items of expense in connection with the estate of Kahinu Mele were objected to. These amount to \$120, \$25 being for the retainer of attorneys who attended to the matter, \$17 for costs of court, \$12 for passage of the mother and boy to Honolulu, \$30 for expenses of the mother and boy, presumably in Honolulu, and \$36, time and expense of the guardian in Honolulu in connection with the same matter. The retainer fee and the costs of court are allowed. The necessity for the expenditure of the other amounts, namely, \$78, not having been shown, the guardian is surcharged therewith.

The last item objected to is \$139.58 for commissions charged by the guardian. In view of the facts appearing from the record, his commissions are reduced to \$100. See *Guardianship of Hoare*, 14 Haw. 443.

Of our own motion we direct attention to a few things in regard to the handling of this estate. As already pointed out, the guardian was derelict in not rendering annual accounts. The guardian was appointed in December, 1899, but there do not appear to be any receipts for the year 1900. This is certainly very strange. The guardian in several instances allowed the tax payments to become delinquent and then sought to charge the ward with the amount of the penalties, which is not correct. The guardian also did not explain why no income was ever received from land in Honolulu on which he paid taxes, which certainly looks queer. The statute expressly provides that the guardian "shall manage the estate of the ward frugally and without waste." Revised Laws, Sec. 2314. And such is the rule in the absence of statute. Guardians should

be held strictly to account and not allowed to play fast and loose with the property of their wards.

It is the order of this court that the guardian be surcharged with \$567.53 and that in other respects the decree be affirmed.

J. Lightfoot, (*Magoon & Lightfoot* on the brief), for Isaac Kaiu.

W. T. Rawlins for the guardian.

A. N. CAMPBELL *v.* MARY LUCAS AND CHARLES LUCAS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 14, 1906.

DECIDED MAY 25, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

In an action by a vendee under a time purchase of land to recover from the vendors the only two instalments paid on account of the purchase price, no deed to be delivered until full payment, and time being of the essence of the contract, the jury being instructed that under the contract the vendee was entitled to the immediate possession of the land and that he could recover if the vendors failed or refused upon request by the vendee to put him in possession, and the evidence being conflicting whether the vendee requested the vendors to put him in possession, a verdict for defendants cannot be disturbed.

OPINION OF THE COURT BY WILDER, J.

This is an action by the assignee of the vendee to recover \$1000 paid to defendants, the vendors, in pursuance of the following contract, to wit:

"THIS AGREEMENT, made this 15th day of April, 1901, between Mrs. Charles Lucas and Charles Lucas her husband, of Honolulu, Island of Oahu, parties of the first part, and W. C. Achi of said Honolulu, party of the second part;

“Witnesseth:—

“That in consideration of the stipulations herein contained, and the payments to be made as hereafter specified, the first parties agree to sell, and the second party agrees to purchase these premises situate at makai side of King Street in Mokauea, Honolulu aforesaid and more particularly described as follows:

“Portion of L. C. A. 803, Apana 2, Pualoa to Alex Adams, lying makai of King Street, Kalihi, Honolulu.

“Beginning at a point on makai side of King Street, at the East corner of this lot, adjoining Mokauea and running by true bearings,

“1. S. 39° 35′ W. 307.2 feet along Mokauea, to

“2. N. 47° 35′ W. 222.0 feet along Mokauea,

“3. N. 42° 40′ E. 246.0 feet along Grant 3303, W. L. Wilcox,

“4. S. 64° 00′ E. 215.0 feet along King Street, to the initial point, and containing an area of 1 36-100 acres, for the sum of Five Thousand Dollars (\$5000.00) and all taxes and assessments from July 1, 1902, lawfully imposed on said real estate on account of which Five Hundred Dollars (\$500.00) is paid, the receipt whereof is hereby acknowledged, the remainder to be paid as follows:

“Five Hundred Dollars per month until paid with interest thereon at the rate of Eight per cent per year.

“Time being the essence of this contract, it is agreed that if any payment shall be in arrears for more than ten days, all further payment shall immediately become due, and the party of the first part shall have the right to demand for the full payment of the balance and if not paid within one month this contract shall be null and void.

“When full payments shall have been received, the said parties of the first part will execute, or cause to be executed, and delivered to the said party of the second part, his heirs, administrators and assigns, a good and sufficient deed to the property above described free from all incumbrances.

“In case of forfeiture, party of the second part will surrender this agreement on demand, and allow the parties of the first part to take immediate possession of the property, together with the improvements and appurtenances without recourse to law.”

One payment of \$500 was made at the time the agreement was executed, and the second payment of \$500 due on May 15th was paid on June 5th, after which no other payments were made.

The main question to decide is whether the court should have directed a verdict for plaintiff, and that turns on whether the verdict for defendants is supported by any evidence.

It was assumed in this court, although not admitted by defendants to be good law, that under the contract Achi was entitled to the immediate possession of the premises, and the jury was so instructed. At the time of the execution of the agreement and the payment of the first instalment, Achi's understanding, as he says, was that a Chinaman was raising vegetables on the land contracted to be sold, that this Chinaman was to be allowed a proper time to remove his vegetables, and that defendant Charles Lucas was to get the Chinaman off the land when Achi requested him to do so. Achi made an attempt to get possession of the land before the Chinaman had removed, with the result that the Chinaman still held on and rebuilt a fence which Achi's man had broken down to get into the land. Then Achi testified that he made demand on Charles Lucas for the possession of the land in accordance with the agreement and this demand was refused, in consequence of which he never got possession and therefore failed to pay any more money under the agreement to the vendors. Charles Lucas denies that Achi ever made demand on him for possession of the land or ever requested him to get the Chinaman off, and also that he, Lucas, never knew of the attempts made by Achi to get the Chinaman off the land and secure possession of it.

The jury was instructed at the request of plaintiff that plaintiff could recover if defendants refused or failed to put Achi in possession when demanded by him, and the case thus went to the jury on a disputed question of fact, namely, whether defendant refused to deliver possession upon being so requested by plaintiff's assignor, Achi testifying one way and Lucas testifying the other way. The jury believed Lucas and did not believe Achi. Under the law in this Territory such a verdict cannot be disturbed. See note to Sec. 1864, R. L.

Plaintiff further contends that defendants, by not tendering Achi possession after he paid the first instalment, put them in default, and that that entitled the vendee not being in default

to recover from the vendors the amounts already paid. There is no merit in that contention, for the reason that the vendee himself testified that he knew when he agreed to buy and the vendors agreed to sell that there was a tenant on the land and that the tenant should stay on the land until he, the vendee, requested the vendors to remove him. And the jury found that the vendee never made any such request.

It follows that the exception to the refusal to direct a verdict for plaintiff must be overruled. This ruling also disposes of the exception to the verdict and to the overruling of the motions for a new trial and for judgment non obstante. Plaintiff's exceptions to the instructions given on behalf of defendants and to that portion of the charge given by the court of its own motion were not argued orally or in the brief and are consequently abandoned.

The exceptions are overruled.

T. M. Harrison, (*Castle & Withington* on the brief,) for plaintiff.

A. Lewis, Jr., (*Smith & Lewis* on the brief,) for defendants.

IN THE MATTER OF THE PETITION OF THE
HAWAIIAN TRUST CO., LTD., FOR A REGIS-
TERED TITLE.

APPEAL FROM COURT OF LAND REGISTRATION.

ARGUED MAY 21, 1906.

DECIDED MAY 28, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

PUBLIC HIGHWAY—*presumption of dedication of the fee.*

A strip of land had been used as a public highway from the year 1853. There was no evidence that the owner had or had not exercised acts of ownership since the year 1892. Held, affirming decree

appealed from, there was no showing that the owner had dedicated the fee to the Territory, or that under Secs. 586, 588 and 593, R. L., the Territory had acquired the fee.

OPINION OF THE COURT BY HARTWELL, J.

This is an appeal by the Territory from a decree of the court of land registration that the fee in a certain roadway which had been used over the petitioner's land since the year 1893 as a public highway, although not expressly dedicated or condemned for the purpose, remained in the owner subject to an easement for a public highway.

The Territory claims the fee in the land under the following sections of the statute:

"All roads, alleys, streets, ways, lanes, courts, places, trails and bridges in the Territory of Hawaii, opened, laid out or built by the Territory, or by private parties, and dedicated or abandoned to the public as a highway, are declared to be public highways. All public highways once established shall continue until abandoned by due process of law." R. L., Sec. 586. (L. 1892.)

"Dedication of any highway, mentioned in section 586, may be by deed or by a surrender or abandonment; such surrender or abandonment shall be taken to be when no act of ownership by the owner thereof has been exercised within five years." R. L., Sec. 588. (L. 1892.)

"The ownership of all public highways and the land, real estate and property of the same shall be in the Territory of Hawaii in fee simple." R. L., Sec. 593. (L. 1892.)

The Territory cannot acquire the fee in a public highway by a mere legislative enactment. The fee is acquired either by compulsory process of condemnation or by the owner's consent, express or implied. The consent is implied, by force of the statute, when the owner exercises no ownership within five years, but no inference can be made in the absence of evidence that an owner does not exercise ownership over his land. This is a fact which must be shown in order to sustain the claim of the Territory that it has acquired the fee on the strength of it. The only presumption of fact which would be proper would be that the owner did exercise his legal rights as owner of the

fee, a thing which in this case he could have done in full recognition of the public easement to use his land for a highway.

Long prior to 1892 he had lost all right to interfere with its public use. To infer from his failure for five years thereafter to interfere with its public use—a thing which he could not lawfully do—that he dedicated the fee to the Territory would be absurd. The statute can have no such effect and requires no such inference.

The claim of the Territory, being supported by no evidence, was properly disallowed.

The decree appealed from, in so far as it limits the right of the Territory to an easement for a public highway, is affirmed.

F. W. Milverton, Deputy Attorney General, for the Territory.

B. L. Marx (Ballou & Marx on the brief) for the petitioner.

Y. AHIN *v.* OPELE (w.)

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 25, 1906.

DECIDED JUNE 6, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

DOWER—*jurisdiction of circuit judge.*

In a suit brought against a widow for the admeasurement of dower, where the widow denies she has any dower right, a circuit judge at chambers has no jurisdiction to determine the right of dower.

OPINION OF THE COURT BY WILDER, J.

This is a suit in equity brought by Ahin, who claims to own in fee simple certain premises, the source of title not being set forth, against Opele, the widow of one who died seized thereof, to admeasure the dower of Opele in same. The peti-

tion alleges that Opele is entitled to a right of dower, is in possession of a part of the premises, and that Ahin is desirous that there should be an admeasurement of the dower interest. Opele answered by denying any right, title or interest in Ahin, and denying any right of dower in herself, and claiming to own all of the premises in fee simple and a right to the sole and exclusive possession.

Ahin filed a motion to set the cause for hearing and trial, on the hearing of which motion Opele asked that it be denied and moved that the bill be dismissed on the ground that no right was shown to bring the suit. The circuit judge dismissed the bill on the theory that there was nothing to try, as the widow had denied she had any right of dower, from which decree Ahin appealed.

In this Territory circuit judges at chambers have jurisdiction to admeasure dower. R. L. Secs. 1648, 1649, 1838. Whether or not only the widow and those designated by statute are entitled to institute proceedings for the admeasurement of dower, see 14 Cyc. 984; *Jackson v. Vanderheyden*, 17 John. 167; *Re Hopper*, 6 N. J. Eq. 325; *Herbert v. Wren*, 7 Cranch 370; *Badgley v. Bruce*, 4 Paige 97. But, even if Ahin had authority to institute these proceedings, could the circuit judge determine that the defendant had a right of dower against her denial of such a right? The only statutory authority, aside from the sections just cited, that appellant relies on are Secs. 1842 and 1843 of the Revised Laws, which provide as follows:

“Matters of probate and of administration shall be heard and determined by the judge having jurisdiction thereof, without the intervention of a jury.” R. L., Sec. 1842.

“But whenever the value of the estate of any deceased person shall exceed five hundred dollars, any person claiming, before any judge, sitting as a court of probate, such estate, or any part thereof, or any interest therein, by virtue of any will or testamentary devise, or by virtue of the statutes of descent of property in this Territory, who may deem himself aggrieved by the decision of such probate judge at chambers, may, upon taking his appeal to the circuit court, if any matter of fact is in issue, move the appellate court that the issue of fact may be tried by a jury, and his motion shall not be denied.” R. L., Sec. 1843.

Those sections, however, only refer to issues of fact arising by virtue "of any will or testamentary devise or by virtue of the statutes of descent of property in this Territory." And it has been held that the estate or right of dower given by section 2271 of the Revised Laws is paramount to both the statute of wills and the statute of descents, and that it is a dower estate and not an estate by descent. *Carter v. Carter*, 10 Haw. 693. Moreover, in the absence of statutory authority, equity will not decide whether the widow is legally entitled to dower. *Palmer v. Casperson*, 17 N. J. Eq. 206; *Ocean Beach v. Brinley*, 34 N. J. Eq. 438. Therefore, it follows that a circuit judge at chambers has no jurisdiction to determine the right of dower when that is denied, even in a case instituted by the widow herself.

Here the bill was brought, not by the widow to have her dower assigned, but against the widow, where the widow says she has no dower. How can the widow be forced to take dower when she says she has no dower right? Can the circuit judge say to the widow, although you deny having a dower right you must take it against your will? The question answers itself.

Appellant furthermore contends that he is remediless at law. He argues that he cannot bring ejectment against her on account of Sec. 2277 of the Revised Laws, because that section, he says, entitles her to remain on and occupy the land until her dower is assigned. That section goes on to provide, however, that the widow's right to remain on the land without having her dower assigned only lasts so long as the heirs do not object thereto. See *Jones v. Pooloa*, 11 Haw. 755. And in this case it is conceded that plaintiff claims under the heir. So it also follows that plaintiff has a plain, adequate and complete remedy at law.

The practice followed in this instance of dismissing the bill on a motion to set for hearing was irregular, but that does not justify a reversal, because it was regarded by both parties as a ruling after the cause had been set down by plaintiff for hearing on bill and answer, and we so regard it.

The decree appealed from is affirmed.

D. L. Withington, (*Castle & Withington* on the brief), for plaintiff.

W. S. Edings, (with whom Kinney, McClanahan & Derby were on the brief), for defendant.

J. O. CARTER v. KOOLAU KAIKAINAHAOLE, ETHEL KAIKAINAHAOLE, A MINOR, HERMAN KAIKAINAHAOLE, A MINOR, AND JOHN KAIKAINAHAOLE, A MINOR.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 4, 1906.

DECIDED JUNE 9, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EJECTMENT—*evidence—constitutionality of mortgage foreclosure act*
(Sec. 2161, R. L.)

The purchaser at a foreclosure sale brought ejectment against the mortgagor's widow and minor children. The plaintiff, unnecessarily showing the title (as the defendants claimed the land under the mortgagor), placed in evidence, under objections and exceptions by the defendants, a land award and patent to one H., probate records including petition of one Kaina for probate of an oral will of H., order appointing Kaina administrator, petition of Kaikainahaole for settlement of administrator's accounts and records of proceedings for distribution; Kaikainahaole's plea in an action of ejectment for this land of uninterrupted hostile possession for more than twenty years; records in *re Estate of Kaikainahaole* showing that the defendant Koolau, as administratrix of her husband's estate, included this land in her inventory; her petition for appointment as guardian of two of the minor defendants and the order appointing her; her petition as administratrix to sell realty belonging to the estate of J. W. K.; her bill in equity, brought as administratrix, for an injunction against the foreclosure; the mortgage deed with the affidavit of the mortgagee's attorney of the foreclosure proceedings; deed from the mortgagee to the plaintiff.

The land award was objected to because there was no evidence to show that the persons signing it had authority to make the award; the patent because written on a loose sheet in a volume of Royal Patents, its number having been written over the original number with no explanation of the alteration and no proof of its signature by the king; the probate records because there was no showing that the different names stood for the same person; the plea because there was no evidence that the defendant was the same person as the mortgagor; the records in the estate of the mortgagor mainly because the minor defendants could not be prejudiced thereby; the bill in equity because its execution was not proved by the clerk's certificate of its verification and also because her acts could not affect the minors; the affidavit of the mortgagee's attorney and the mortgage deed because the foreclosure act (Sec. 2161, R. L.), was unconstitutional in failing to specify the kind and place of publication of notice of intention to foreclose. Exceptions were also taken to the finding that the mortgagor had a title by adverse possession and was the common source of title; that plaintiff obtained a valid title at the foreclosure sale; that the defendants were in possession at the date of the institution of the action and were entitled to judgment for the premises and \$3250 damages.

Held: The award and patent were admissible; the evidence of the guardian's appointment, if irrelevant, was harmless; the different names mentioned in the probate records, referring to this land, evidently referred to the same person; the plea of title by adverse possession was evidence of claim and assertion of title; the foreclosure act is not invalid by reason of failure to specify the kind and place of publication of notice of intention to foreclose.

Id.—common source of title—effect of answer of general denial.

The rule that a plaintiff must recover upon the strength of his own, and not upon defendant's lack of title, does not require proof that the title under which both claim is good. The defendants' denial of the plaintiff's right of possession authorized the ruling that they held against the plaintiff's right.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff brought ejectment for certain land purchased by him at a mortgagee's sale, the defendants being the widow and three minor children of the mortgagor, which land the defendants, as alleged in the complaint, had "unjustly, and"

contrary to law and the rights of the plaintiff, taken into their possession and *converted to their own use*," the complaint, also averring "the said conversion and occupation by defendants being to the damage of plaintiff in the sum of \$500," (afterwards amended to \$5,000,) prays for "restitution of said property with damages in the sum of \$500 (\$5,000) for its detention." The widow, answering for herself, denied each and every allegation in the complaint and, having been appointed guardian ad litem of the minor defendants, their answer, by the guardian ad litem, also denied each and every allegation in the declaration. Jury having been waived, the court, after hearing the evidence, gave judgment for the plaintiff for the restitution of the premises with \$3250 damages.

The bill of exceptions presents eighteen exceptions, the following being exceptions to the introduction of evidence by the plaintiff, namely:

1. Land Award No. 728, contained in Vol. 2 of Awards, p. 111, awarding the land in controversy to one Holualoa, the award not being dated and there being no evidence to show that the persons signing the same had authority to make the award;

2 & 3. Introduction of R. P. 6892, granting the land to Holualoa, the copy being upon a loose sheet of paper in Vol. 28 of Royal Patents and No. 6892 having been written over 5767, there being no explanation of the alteration and no proof of the king's signature;

4 & 5. Certain records of the supreme court in probate including petition of one Kaina for probate of an oral will of Holualoa, order appointing Kaina administrator, petition signed by Kaikainahaole for settlement of his accounts as administrator, and further record of proceedings for distribution of the estate, the objection to the records being that the petition for administration was not sworn to, there was no evidence of the identity of Holualoa named in the petition with the one named in the land award or patent, nor of the publication of the notice of hearing of the petition, nor of the identity of the petitioner, Kaina, with the person later named in the proceedings as Kaikaina or Kaikainahaole (As to the fourth and fifth excep-

tions, the court, in the bill of exceptions, notes that none of the testimony "purporting to have been given upon the hearing of any petition or petitions in the matter of said estate of Holualoa was read in evidence or considered by the court, the plaintiff's previous offer thereof as a portion of the record in said cause having been withdrawn");

6. The supreme court record in Law No. 1504, *Kahululei-onohi v. Kaikainahaole*, including the plaintiff's declaration in ejectment for the land sued for in this case, the defendant's answer with a plea in bar in which the defendant claimed uninterrupted hostile possession for more than twenty years, the plaintiff's replication that the defendant took the premises as administrator and therefore could not have obtained a prescriptive title, the decision overruling the replication, there being no evidence that the defendant was the same person as the mortgagor of this land;

7. Probate records in *Estate of John W. Kaikainahaole*, showing that the defendant, Koolau, as administratrix of her husband's estate, filed an inventory including the land in controversy. This was objected to, among other reasons, because the minor defendants ought not to have been prejudiced by any such document;

8. Refusal of the court to strike out the inventory;

9. Admitting in evidence the petition of the defendant, Koolau, for her appointment by the circuit court as guardian of the minor defendants, alleging that they were the minor children of John W. Kaikainahaole, and the order appointing her as such guardian;

10. Admitting in evidence the petition of the same administratrix in the matter of the guardianship of the minor defendants to sell realty belonging to the estate of John W. Kaikainahaole, there being no evidence that she had then been appointed guardian of the minor son, John;

11, 12 & 13. Evidence of the defendant, Koolau's, bill in equity, brought by her as administratrix of her husband's estate, and seeking an injunction against the mortgagee's foreclosing the mortgage, objected to because filing of the bill was in the

official capacity of the administratrix and that nothing therein was now binding upon her in her individual capacity or upon any of the minor defendants with reference to the title of the land, and also that the execution of the bill by Koolau could not be proved by showing the document itself without other evidence except as her oath to the bill was certified by the clerk of the court, and to the refusal of the court to strike out the bill;

14 & 15. Evidence of the tax assessor for the first division of the Territory, having the custody of the assessment books for Honolulu, who produced a book which he said was the assessment book for the district for the year 1860, which was allowed in evidence although the assessor said that he did not know whether the book was genuine, and who also was permitted to read in evidence entries from a large number of assessment books containing entries of assessment of land described as "house lot at Kawaiahao," unidentified by award or patent, assessed to one Kaikainahaole with no evidence identifying him with the mortgagor in this case;

16. Introduction in evidence of the mortgage with the affidavit of the mortgagee's attorney, McClanahan, of the proceedings taken at the foreclosure. Objected to on the ground that the statute under which the foreclosure was made is unconstitutional;

17. Deed from the mortgagee to the plaintiff. Objected to on the ground that there was no evidence of the execution by Allen of the power of sale, the affidavit not being evidence if the statute was invalid.

18. This exception is to the written decision of the court,— (1) that at the date of the mortgage to S. C. Allen, the mortgagor, J. W. Kaikainahaole, had title to the premises in dispute by adverse possession; (2) and that he had this title at the date of his death, subject to the mortgage; (3) and that findings 1 and 2 are made "irrespective of the tax books"; (4) "John W. Kaikainahaole is the common source of title of both plaintiff and defendants": (5) that plaintiff obtained title to the property at the foreclosure sale under the mortgage and that the foreclosure and sale were valid; (6) that plaintiff was

entitled to \$3250 damages as "the fair rental value of the property during the period in dispute"; (7) that the defendants were in possession of the premises at the date of the institution of the action; and (8) that plaintiff is entitled to judgment for restitution of the premises and \$3250 damages.

The Land Commission Award contained in the volumes of awards, although undated and unaccompanied by evidence that the persons signing the same as commissioners were authorized to make the award and the copy of the Royal Patent issued on the award, contained in Vol. 22 of Royal Patents, although the sheet had become loose and there was an unexplained erasure of its number and the insertion of another number in its place, were prima facie evidence that the land was awarded and patented to one Holualoa. (See Sec. 1936, R. L.)

The probate records were evidence that Kaina, Kaikaina or Kaikainahaole, evidently the same person, brought the proceedings referring to this land, and claiming it under an oral will of Holualoa. The defendant's plea of title in the land by adverse possession was prima facie evidence of his claim and assertion of title. The inventory filed by the defendant Koolau, as administratrix of the mortgagor's estate, was evidence that she claimed this land for the estate. The relevancy of the appointment of Koolau as guardian is not apparent but it could have harmed no one. The petition of the administratrix for an order of sale was evidence that she continued to claim the land as part of her husband's estate, and the same is true of her bill in equity which was sufficiently authenticated by the signature of the clerk of court to his certificate that she had sworn to its truth. The mother's admissions and claims would not be evidence against the minors, but even if the court treated them as evidence against the minors this would not be reversible error as enough evidence remained to show ten years' adverse occupancy by the mortgagor and his heirs. The assessor's books were not considered by the court and their admission in evidence was therefore harmless.

The defendants' claim that the "Act to Provide for the Sale of Mortgaged Property without Suit and Decree of Sale,"

Chap. 33, Acts 1874 (Sec. 2161, R. L.), is unconstitutional because failing to specify the kind and place of publication of notice of the mortgagor's intention to foreclose, was one of the grounds on which they brought a bill against this plaintiff and the trustees of the mortgagee to set aside the mortgage and for an injunction against an action of ejectment. The court said that, without implying that the contention was sound or that if the statute and therefore the sale were void, equity would set aside the sale, and if the statute were void in respect of its requirement of publication, "the sale might well be sustained as having been conducted in pursuance of the provisions of the mortgage irrespective of the statute or perhaps in pursuance of that portion of the statute which provides that such notices shall be given and such acts done as are authorized or required by the power contained in the mortgage." Ante, p. 54. Power of sale mortgages were commonly used here long prior to 1874.

In this view, which we affirm, the foreclosure sale, made pursuant to the power in the mortgage, was valid and barred the mortgagor and those claiming under him from all right in equity to redeem the mortgaged premises on payment of the debt and interest. It would be unnecessary, unless made so by statute or by the terms of the mortgage, that any notice should be given to the mortgagor, or those holding under him, of the mortgagee's intention to foreclose upon breach of condition. But the statute, as well as the power, requires publication of the notice in the Hawaiian and English languages for three consecutive weeks before the sale. The court would not permit this requirement of the statute to be disregarded or its effect to be nullified by an illusory or an evidently fraudulent publication, such, for instance, as a publication made orally or in some remote out of the way place with the evident intention of defeating its object. When such instances shall occur they will be dealt with by a court of equity; but the fact that the statute makes such evasive publications possible, if it does, is not ground for holding that it is invalid.

In conformity with this ruling the affidavit of the mortgagee's attorney was evidence of the matters therein stated, namely, that the mortgagee had "in all respects complied with the requisitions of the power of sale in relation to all things to be done by him before selling the property." Sec. 2163, R. L.

The plaintiff unnecessarily undertook to show the mortgagor's title and the court found that it was shown by the evidence. The defendants claim that the evidence was wholly insufficient to sustain the finding of a title by adverse possession in the mortgagor, but we think that the evidence sustains the finding. It was, however, unnecessary to prove the title. All that the plaintiff need to have done was to show that the defendants claimed the land as widow and heirs of the mortgagor and under no other claim. The rule that a plaintiff must recover solely upon the strength of his own title and not upon the defendant's lack of title does not require proof of the title under which both sides claim. Having first ascertained, as the plaintiff could easily have done by evidence in the absence of pleadings, that the defendants claimed no other right than that which the mortgagor had, which was subject to the mortgage, the plaintiff's right to the land was thereby determined upon showing the foreclosure sale made to him in the exercise of the power contained in the mortgage. This would have dispensed with all the rest of the evidence introduced by the plaintiff, with the defendants' objections and with the rulings, exceptions and findings relating to it, for they were of no sort of use in determining the plaintiff's right.

The defendants, in argument of their exception to the finding that each of the defendants was in possession at the date of the institution of the action, say that the minor defendants were not of an age making them capable of committing the tort, alleged in the declaration, that they had "unjustly and contrary to law and the rights of the plaintiff taken into their possession and converted to their own use" the land in question. It is claimed that the court improperly assumed that these minors, by living with their mother upon the premises, committed the tort of disseizin.

The answer filed in behalf of the minor defendants by their guardian ad litem, denying the plaintiff's right to the possession of the land, authorized the ruling that they were holding possession against the plaintiff's right. Of course there could be no such thing as "conversion of the land." This expression, in the statutory form, referring only to personal property, may be treated as surplusage.

No question is made about the amount of damages awarded. Exceptions overruled.

E. B. McClanahan (Kinney, McClanahan & Derby on the brief) for plaintiff.

C. W. Ashford for defendants.

TERRITORY OF HAWAII *v.* C. B. HALL.

ERROR TO THE DISTRICT MAGISTRATE OF WAIMEA, KAUAI.

ARGUED JUNE 13, 1906.

DECIDED JUNE 18, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

FURNISHING INTOXICATING LIQUOR TO A MINOR—*evidence of dealer's knowledge of age of the minor.*

At an evening entertainment at the defendant's liquor saloon there was a minor among the musical performers furnished with beer served by one of the defendant's employees but placed on a table, where the beer was drunk, by one not in the defendant's employ; the defendant was in and out during the evening. Held: The evidence justified the inference that the defendant knew the beer was being indirectly furnished to the musicians. It was for him to show, which he did not undertake to do, that he did not know or had no reason to suppose that any of them were minors.

OPINION OF THE COURT BY HARTWELL, J.

The magistrate convicted the defendant and sentenced him to a fine of \$25 and \$3 costs on the charge of violating Par. 5,

Sec. 12, Act 67, Laws of 1905, by furnishing beer to two minors at the business place (saloon) of the Kauai Wine & Liquor Co., of which the defendant was manager, the sentence being based on Sec. 40.

The errors assigned are: (1) That, in respect of Ioane, one of the boys furnished with beer, there was no evidence that he was a minor, but his father's evidence was that he was fully nineteen years of age, having been born in March, 1885, making him over twenty years old at the date of the offense charged; (2) That there was no evidence that the defendant or his agent or servant furnished the beer, or that either of the two persons referred to in the evidence as furnishing the beer was his servant or agent or authorized by him to furnish it, the evidence being that neither was his servant or agent or was acting on his behalf, and that shortly prior to the occasion referred to in the evidence as that on which the beer was furnished the defendant directed that no beer or other spirituous liquor be given or furnished to any minor and that all minors present at the place should be excluded.

Ioane testified that he had told the policeman that he was nineteen years of age but that he was not certain. We cannot say that the magistrate erred in finding his age to be as first stated by him for it does not appear that he made such finding.

It appears to have been a field night at the defendant's saloon on the occasion referred to, a crowd, including boys, being present, singing and instrumental music going on with free beer for the musicians, among whom were these two boys. The defendant was in and out and, of course, must have seen and approved what was going on, as, for instance, as one of the boys testified,—“I got beer for nothing while I was there. I was playing music there. Our leader told me to go there. Keodora (one of the defendant's employees) and others poured out the beer and called us.” The other boy testified that he drank beer there handed to him by Aka and Andresen and that he got the beer for nothing; that the beer was set on a table.

The defendant is not exempt from the penal consequence resulting from beer being furnished to minors on the licensed

premises by a showing that it was not directly furnished by himself or any one in his employ but was furnished by some one else to whom it was handed by his agent or servant. It was a condition of the license "that no intoxicating liquor shall be sold or furnished to any minor," which condition was violated by the furnishing of the beer in this case. The intention of the statute is clear to protect minors from saloon influences, one of the conditions being "that no minor shall be permitted to loiter in or about the licensed premises." The condition that beer should not be furnished to minors was violated whether the defendant expressly authorized or consented to its being done or not. Evidently his employees dealt out the beer to others who set it before the minors.

But the important question presented in the case is not whether the evidence justifies, as we think it does, an inference that the defendant knew that the boys were drinking his beer on the premises, furnished them indirectly by his employees, but whether it can also be inferred from the evidence that he knew that the boy Hiram, shown by the evidence to have been eighteen years of age, was a minor.

In *Territory v. Cunha*, 15 Haw. 607, the defendant had been found guilty of employing a minor in his liquor saloon. Upon the question whether the evidence showed the defendant's knowledge or intent or responsibility on his part as to the minor's presence in the saloon, the court said: "We may assume for present purposes that such a showing must be made affirmatively and that it is not sufficient to show merely that the minor remained in the saloon and leave it to the defendant to show that he was ignorant of it and had nothing to do with it." It does not appear that in that case the defendant actually knew the age of the minor who testified that he was eighteen years old and that the defendant employed him in his saloon. The evidence was considered by the court to be sufficient to sustain the conviction.

The fact that the minor was furnished with beer upon the licensed premises showed a violation of the condition of the license, leaving it for the defendant to show his ignorance that the boy was a minor or that he had no reason to suppose it.

Judgment affirmed.

M. F. Prosser, Deputy Attorney General, for the Territory.

A. Perry (W. T. Rawlins with him on the brief) for defendant.

J. W. PRATT, COMMISSIONER OF PUBLIC LANDS, v.
C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS.

SUBMISSION ON AGREED FACTS.

ARGUED JUNE 4, 1906.

DECIDED JUNE 18, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ORGANIC ACT—*power of superintendent of public works over public lands.*

Section 75 of the Organic Act gives the superintendent of public works the same limited power of disposing of lands described in the proviso of Section 262, R. L., that the minister of the interior formerly had, and controls Section 73 of the same act in that regard.

PUBLIC LANDS—*town lots.*

Remnants of land in Honolulu not contained in any grant, not needed for any public purpose, and not within any contemplated public use, are "town lots" within the meaning of the proviso of Section 262, R. L.

ID.

This court cannot decide in advance whether the superintendent of public works should or should not turn over certain lands to the commissioner of public lands under Section 262, R. L.

OPINION OF THE COURT BY WILDER, J.

This is a submission on agreed facts under R. L., Sec. 1748. Defendant is about to recommend, against the protest of plaintiff, the issuance of a patent to one Shingle of a certain lot of kula land, being a remnant not included in any grant and

known as "lot 542 A," situate in Honolulu on the Waikiki side of Shingle street near the corner of Piikoi and Shingle streets, and adjoining the northwesterly boundary of the Lunalilo Home premises, and is about to lease to one Ryan 3.03 acres of land in Honolulu on the makai side of Middle street, Kalihi, being kula land suitable for either agricultural or building purposes. Neither one of these pieces of land is devoted to nor needed for any public purpose or within any contemplated public use. Defendant relies upon section 75 of the Organic Act and plaintiff upon section 73 of the same act.

The questions for determination are (1) whether the superintendent of public works has the right either to recommend the issuance of or to countersign or to cause to be issued a patent as aforesaid, or to make a lease as aforesaid, (2) whether said pieces of land are "town lots" within the provisions of R. L., Sec. 262, (3) what is included in the term "town lots" as used in said Sec. 262, and (4) whether lands enumerated in the proviso of R. L., Sec. 262, should be turned over by the superintendent to the commissioner of public lands in cases where they are neither devoted to nor needed for any public purpose.

Sections 73 and 75 of the Organic Act are as follows:

"That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. * * * In said laws 'land patent' shall be substituted for 'royal patent:' 'commissioner of public lands' for 'minister of the interior,' 'agent of public lands,' and 'commissioner of public lands,' or their equivalents. * * * " Sec. 73, Organic Act.

"That there shall be a superintendent of public works, who shall have the powers and duties of the superintendent of public works and those of the powers and duties of the minister of the interior which relate to streets and highways, harbor improvements, wharves, landings, waterworks, railways, electric light and power, telephone lines, fences, pounds, brands, weights and measures, fires and fireproof buildings, explosives, eminent domain, public works, markets, buildings, parks and cemeteries, and other grounds and lands now under the control

and management of the minister of the interior, * * * ”
Sec. 75, Organic Act.

In the days of the kingdom the following were the statutes in existence:

“A Royal Patent, signed by the King, and countersigned by the Minister of the Interior, shall issue under the great seal of the kingdom to the purchaser in fee simple of any Government land or other real estate; and also to any holder of an award from the Board of Commissioners to quiet land titles for any land in which he may have commuted the Government rights.” Compiled Laws, Sec. 43.

“The said Minister, by and with the authority of the King in Cabinet Council, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the kingdom, subject, however, to such restrictions as may, from time to time, be expressly provided by law. And provided that no sale of one land or lot exceeding five thousand dollars in value shall be made without the consent of the King and a majority of the Privy Council.” Compiled Laws, Sec. 42.

The constitution of 1894 amended those sections by changing “king” to “president” and “kingdom” to “republic” and “king in cabinet council” to “executive council.” The code commission changed these two sections so that they now read as follows:

“Except as otherwise provided, a land patent, signed by the governor, and countersigned by the commissioner of public lands or superintendent of public works, as the case may be, shall issue under the great seal of the Territory to the purchaser in fee simple of any government land or other real estate; and also to any holder of an award from the board of commissioners to quiet land titles for any land in which he may have commuted the government rights.” Sec. 250, R. L.

“The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject however, to such

restrictions as may, from time to time, be expressly provided by law." Sec. 252, R. L.

The "land act of 1895" provided as follows:

"In this Act, if not inconsistent with the context, 'Public Lands' means all lands heretofore classed as Government lands, all lands heretofore classed as Crown Lands, and all lands that may hereafter come into the control of the Government by purchase, exchange, escheat, or by the exercise of the right of eminent domain or otherwise except as below set forth. * * *

"Provided however, that this Act shall not apply to the following classes and descriptions of land, the property of the Government, all of which shall remain under the control and management of the Minister of the Interior.

"Town lots, sites of public buildings, land used for public purposes, roads, streets, landings, nurseries, tracts reserved for forest growth, and conservation of water supply, parks, and all lands which may hereafter be used for public purposes. All land hereafter reserved by the Commissioners for public purposes, shall thereupon at once pass under the control and management of the Minister of the Interior.

"The Minister of the Interior with the consent of the Executive Council shall have the authority at any time to turn over to the Commissioners for the purposes of this Act any lands or parts of lands reserved for public uses."

That section now stands in the Revised Laws as follows:

"In this chapter, if not inconsistent with the context, 'public lands' mean all lands heretofore classed as government lands, all lands heretofore classed as crown lands, and all lands that have since August 14, 1895, or may hereafter come into the control of the government by purchase, exchange, escheat, or by the exercise of the right of eminent domain or otherwise except as below set forth. * * *

"Provided, however, that this chapter shall not apply to the following classes and descriptions of land, the property of the government, all of which shall remain under the control and management of the superintendent of public works.

"Town lots, sites of public buildings, land used for public purposes, roads, streets, landings, nurseries, tracts reserved for forest growth, and conservation of water supply, parks and all lands which may hereafter be used for public purposes. All land hereafter reserved by the commissioner for public purposes, shall thereupon at once pass under the control and management of the superintendent of public works.

"The superintendent of public works with the consent of the governor shall have the authority at any time to turn over to the commissioner for the purposes of this chapter any lands or parts of lands reserved for public uses." Sec. 262, R. L.

The Land Act of 1895 provided for a board of three commissioners of public lands, one of whom was the minister of the interior. The Organic Act apportioned the powers and duties of the minister of the interior between the superintendent of public works and the commissioner of public lands, in the main the division being that a commissioner of public lands took those powers and duties of the minister of the interior set out in the Land Act of 1895, the Boundaries Act, and the act providing for royal patents issuing on land commission awards, and the superintendent of public works those powers and duties outside of those acts, among which were the "powers and duties which relate to * * * other grounds and lands now under the control and management of the minister of the interior," meaning the lands mentioned in the proviso of section 2 of the Land Act of 1895. As pointed out in the note to R. L., Sec. 250, there were three classes of public lands, namely, (1) those intended for settlement, that is, homestead purposes, etc., which may be considered "public lands" proper; (2) the lands referred to in the proviso of Sec. 262, R. L., being mainly those used for public purposes; and (3) lands for school purposes.

The power of the superintendent of public works to dispose of lands in class 2 is found in Sec. 75 of the Organic Act, which says that he shall have the "powers and duties of the minister of the interior which relate to * * * grounds and lands under the control and management of the minister of the interior." If the minister of the interior formerly had a limited power to dispose of those lands, (and about that of course there is no question,) the superintendent of public works now has the same power, unless section 73 of the Organic Act has lodged that power in the commissioner of public lands. That section, in the first place, refers to the laws of Hawaii "relating to public lands, the settlement of boundaries, and the issuing of patents on land commission awards," and then

provides that in "said laws" the "commissioner of public lands" shall be substituted for the "minister of the interior." That the commissioner is substituted for the minister in the laws relating to the settlement of boundaries and the issuance of patents on land commission awards is clear. The only question is whether in the laws relating to public lands, where the commissioner is substituted for the minister, it means public lands in the sense of all lands belonging to the government, that is, to the public, or the public lands mentioned above as being class 1. If the former meaning is the correct one then there is a direct conflict between sections 73 and 75 of the Organic Act, because the latter section has given to the superintendent of public works the powers and duties of the minister of the interior which relate to lands in class 2, and one of those powers was to dispose of those lands. And that meaning would force the conclusion that the effect of the proviso of Section 262, R. L., was that the commissioner of public lands had authority to turn over certain lands to himself, which would be an absurdity. It is provided by statute in this Territory that every construction which leads to an absurdity should be rejected. R. L., Sec. 13. That is also a well known principle of statutory construction. End. Int. Stat., Secs. 258, 264; Lewis' Suth. Stat. Con., Secs. 489, 490. It is another well known principle of statutory construction that every construction which leads to a conflict between two sections in the same act should be avoided. End. Int. Stat., Sec. 40; Lewis' Suth. Stat. Con., Sec. 346. Section 75 of the Organic Act is particular in specifying the power of the superintendent, and section 73 of the same act is general in substituting the commissioner for the minister. Therefore the claim contended for by plaintiff, in the first place, would give rise to a conflict between the two sections, in the second place to an absurdity, and in the third place to allowing a general provision to prevail over a later particular provision, the inference to be drawn from all of which is that section 75 is to control section 73 in so far as they would otherwise conflict.

Plaintiff concedes that the lands mentioned in the proviso of section 262, R. L., which we have called class 2, shall be under the "control and management" of the superintendent. But if the commissioner of public lands shall be substituted for minister of the interior in all laws relating to public lands in the sense of meaning both classes 1 and 2, then he would also have to be substituted as to these lands in class 2 which, as already pointed out, would lead to an absurdity. Conceding then, as he does, that the superintendent now has the control and management of those lands, which is given to him by section 75, why does not section 75 also give him besides the control and management the limited power to dispose, that is, by leasing or recommending the issuance of a patent, which the minister of the interior formerly had? The section gives him both the power of control and management and the power of disposition or it gives him neither. The matter, therefore, cannot be determined simply by ascertaining whether the power to control and manage includes the power to dispose.

Plaintiff further contends that, if his construction is not adopted, it will militate against a just balance of powers between branches of the executive department, and it will make for confusion, divided responsibility and uncertainty not only of official duties and public records but of land titles as well and that it will open "avenues of abuse and graft." It does not appear that such results will follow, but, even if they may, congress had the power to so legislate, and in our opinion it has done so.

Reference is also made to the practice existing under Governor Dole's administration of following the construction contended for by plaintiff. This not only does not appear from the submission, but the contrary does appear, in that the superintendent has recommended to the present governor and countersigned with him two patents of lands in class 2 and against the protest of the commissioner. But, even if there was such a practice during Governor Dole's regime, we do not understand that that would prevail against well settled principles of statutory construction.

It is also claimed by plaintiffs that chapter 21 of the Revised Laws, authorizing the superintendent of public works to lease on certain conditions lands in class 2, as we have designated them, shows that that chapter was enacted to give him some powers which he did not formerly have. An examination of that chapter will show, however, that it is a limitation of his power to lease and apparently contemplated by section 252, R. L., that the power to lease, etc., shall be subject "to such restrictions as may from time to time be expressly provided by law."

Plaintiff argues that, because section 73 of the Organic Act provides that "land patent" shall be substituted for "royal patent" in "said laws," it meant other statutes besides the Land Act of 1895 in which "royal patent" did not appear. It did mean other statutes besides that act, for instance, the laws relating to the issuance of royal patents on land commission awards.

The conclusion is, therefore, that the Organic Act divides the powers which the minister of the interior formerly had.

The second question is whether the lands which the defendant desires to lease or dispose of are "town lots" within the meaning of section 262, R. L. It appears that they are remnants not contained in any grant and not needed for any public purpose nor within any contemplated public use. They are not within the description of public lands referred to in section 263, R. L., with which now the superintendent has nothing to do, and they are within the description mentioned in the proviso of section 262, R. L. Therefore, the second question is answered in the affirmative.

The third question as to what is included in the term "town lots," as used in section 262, R. L., depends on what the facts are with reference to the particular lands, and no facts are set forth. Therefore the question is not answered.

The fourth question is whether the lands mentioned in the proviso of section 262, R. L., should be turned over to the commissioner in cases where they are neither devoted to nor needed for public purposes. The superintendent, with the con-

sent of the governor, has the authority to turn over lands reserved for public uses to the commissioner, and consequently this court cannot decide that he should or that he should not turn over such lands.

Judgment accordingly.

C. F. Clemons, (Thompson & Clemons on the brief,) for plaintiff.

F. W. Milverton, Deputy Attorney General, for defendant.

JOHN KINGHAM v. HONOLULU RAPID TRANSIT
AND LAND COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 17, 1906.

DECIDED JUNE 22, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EXCEPTION—*error in striking out evidence—party excepting, not being wholly unnecessary, granted new trial on condition of paying costs to date.*

In an action for injuries caused by an ejectment from a street car, the plaintiff having given testimony from which the jury might have found that his inability to work thereafter was due either to such injuries or to an affliction, unconnected therewith, it was error to strike out the testimony in regard to such affliction; and the defendant, not being entirely free from blame in the part it took in the immediate proceedings out of which the error arose, while held not estopped from taking advantage of the error, is granted a new trial only on condition of paying all costs to date.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for damages resulting from an ejectment of the plaintiff from an electric street car of the defendant cor-

poration by the conductor of the car. The case comes here on twenty-six exceptions, most of which are overruled without further comment as abandoned or founded on harmless errors or on correct rulings. The only exceptions that call for serious consideration are those which raise the question as to whether the verdict, which was for the plaintiff in the sum of \$5000, was excessive, and whether the defendant can now have the benefit of an exception to the striking out of certain evidence in regard to an affliction of the plaintiff's right arm called peripheral neuritis. This evidence bore upon the question whether the plaintiff was obliged to give up his employment because of the injuries received from the accident or because of the peripheral neuritis as an independent cause and so bore upon the question as to the extent or permanency of the injuries resulting from the accident alone.

The jury might have found the following from the evidence: The plaintiff, a widower, living alone, sixty-one years of age, with an expectation of life of $13\frac{1}{2}$ years, had worked at the Honolulu Iron Works five or six years, during the last three of which he had been afflicted with asthma, which had caused him to lose considerable time; his wages were \$4.25 a day; on May 7, 1905, he boarded the defendant's car on King street in Honolulu going towards Waikiki at the corner of Punchbowl street and when crossing the marsh from King street to Waikiki road was seized with an attack of asthma which caused him to leave the car when it reached the Waikiki road, with a view to walking off the asthma; he walked back towards town on the Waikiki road until he was near the junction of that road with King street, when he heard a car coming on King street and ran to catch it, but finding that it was going in the wrong direction he walked on King street to the first station towards town and there boarded the first car going towards town, which happened to be the same car on its return trip on which he had gone out; he was then very much choked up with the asthma, which was made worse by his running for the car; after riding a short distance the conductor came and asked him to "Dig up, old man;" plaintiff told him to stop a minute or two because

he was sick; the conductor then said, "Old man, if you wont dig up when I come back I will throw you off the car. This is the second station you have rode without paying," and then went forward and soon after returned; the plaintiff was then standing up holding on to the back of the seat in front of him with one hand and trying to get his money out of his hip pocket with the other hand, there being more than \$30 in the pocket and the pocket having a flap with a button, which made it difficult to get the money out; the plaintiff then said to the conductor "You wouldn't throw a man off the car, would you, put your hand in my pocket and take a nickel out," whereupon the conductor said, "I wont, would I," and stamped on the plaintiff's left foot and with his hands pushed the plaintiff off "just like a flash" when the car was in motion just speeding up after having stopped at what is called the Neumann switch, which was not over three minutes' run from where the plaintiff boarded the car; the plaintiff struck the edge of the stone curbing of the sidewalk, which was only a few feet from the car track, on the small of his back and cried so with pain as not only to cause the employees and passengers in the car to turn around but to cause persons in houses on the opposite side of the street to come out to the man; the motorman upon hearing the cry stopped the car, but was ordered by the conductor to go ahead, which he did; the persons from the opposite houses found the plaintiff lying with the small of his back on the edge of the curbing, his feet towards the track and his head on the sidewalk, in great pain and in a semi-conscious condition and lifted him on to the sidewalk, bathed his face with a wet towel and called an ambulance, in which he was taken to the hospital; there he was put on the operating table, stripped and examined, when there were found a bruise extending from near the ankle upwards about two inches, but which was superficial and not of a serious nature, and a reddish contusion or welt in a straight line from six to eight inches in length and about an inch and a quarter in width extending across the back from a little to the right of the spine towards the left; the examination at that time

was not very thorough owing to the great pain which the plaintiff suffered when he was touched in the region of the welt, but a day or two afterwards it was discovered that the eleventh rib was broken about three inches to the left of the spine; the plaintiff remained in the hospital five weeks, during which time he suffered much pain, which was greatly increased by the coughing due to the asthma; he spat blood frequently during that time; after leaving the hospital he was not able to resume work until about the middle of October; then when at work he grew worse and finally was obliged to stop working about the middle of December and had not been able to work after that up to the time of the trial, which was five or six weeks later; he had paid \$45 on account of his hospital bill of \$52.50.

The defendant contended among other things that the plaintiff was intoxicated on the day of the accident and had used vile and abusive language to the motorman and conductor on the out trip and to the conductor on the return trip, that he declined to pay his fare, that the conversation between him and the conductor on the return trip was not as represented by the plaintiff, that he was removed from the car without violence and making no resistance and when the car was not in motion, that after he was safely on his feet upon the ground he staggered and fell, that there was no spitting of blood, and that the injuries were not of a serious nature. The jury must have disbelieved more or less of the testimony offered by the defendant and accepted as true that for the plaintiff, where they differed.

Whether the verdict was excessive or not, it is unnecessary to decide, for if it had been left to the jury to say how far leaving the iron works was due to the peripheral neuritis and how far to the injuries resulting from the accident and if they had found, as they might have found in such case, that it was due wholly or mainly to the peripheral neuritis, they might have rendered a verdict for a materially less amount; and therefore if, as we hold, the trial judge erred in striking out the evidence as to peripheral neuritis and the defendant can now take advantage of that error, the verdict must be set aside and a new trial

ordered, irrespective of the amount of the verdict that was rendered.

There can be no doubt that it was error to strike out the evidence. A mere statement of the evidence as to why the plaintiff left the iron works, coupled with the plaintiff's concession that the accident was not the proximate cause of the neuritis is sufficient to show that the jury might properly have found, if the evidence as to the neuritis had been left in, that leaving the iron works was due to the neuritis, while with that evidence struck out the jury had practically no alternative to finding that leaving the iron works was due to the weakness of the back and the increase of asthma resulting from the accident. This evidence is in the main as follows as given by the plaintiff himself. It will be given in narrative form.

On direct examination: "I began to work there (at the iron works in October) and I still began getting worse. In December as compared with the way I was before, I couldn't work at all. My tools dropped out of my hand and I couldn't pick my work up or twist it around to do anything. I am a machinist, it is necessary to lift heavy weights all the time. It is all heavy work, the heaviest work I ever did in my life. I couldn't follow my situation up whatever. I had to leave it. Before I received these injuries I was all right aside from the asthma. As to the present condition of my back, it hurts me so that I can't pick nothing up. I tried. Actually when I get down on the floor I can't get up hardly. I have not been able to do any more or other work since I knocked off in December. My arm is very bad. The asthma comes on me much more quicker than it used to do. Also my back has been very bad, just the same, and this—afflicted with my arm." Transcript, pp. 17, 18, 20, 21.

On cross examination: "About the middle of December the trouble with my arm came on me, when I left work. Dr. Judd has treated me for that. On the day I knocked off work, when the tools fell out of my hand I tried to pick them up two or three times and use them and I couldn't. My arm began to pain first up by my elbow and it gradually got down to my fingers, just like a complete numb, and I thought my arm'd bursted it seemed so big, so as I couldn't hold my arm up. I was obliged to swing it in that way [showing] to get relief from

pain, and then I went up to Dr. Judd and got him to look at it and he is treating it today for the same thing. I can't use my arm at all. The pain has been something terrible up to this last week every day. I walked the floor for three nights and on Sunday morning at about 8 o'clock I did manage to lay down and get a good sleep. The pain was that great it was just like my arm was going to burst, and since it has gone away, except what is in my fingers, the end of my fingers. Sometimes I begin to tremble and I can't hold myself still. I try but I can't do it. If I begin to talk and stand up sometimes it comes on me very rapidly and other times it will be stopped for a little while. Right from my elbow down to the ends of my fingers. From the elbow it goes to my bone but it goes down. I have had it in my bones so I could hardly move from pain." Transcript, pp. 35-38.

The defendant contends that striking out all evidence as to the arm not only precluded him from submitting to the jury whether that was not the sole or principal cause of the plaintiff's leaving the iron works but also from introducing experts, of whom he claims to have had two present for the purpose, to show that peripheral neuritis was unconnected with the accident and was due to excessive use of intoxicating liquor, but it is unnecessary to consider the latter branch of the argument, especially in view of the fact that it was conceded that the neuritis was not caused by the accident.

The question of chief difficulty is whether, prejudicial error having been made and an exception taken to the ruling by which it was made, the defendant is estopped from taking advantage of it either by reason of having caused it to be made or by reason of having acquiesced in it. In order to dispose of this question satisfactorily it will be necessary to set forth the proceedings leading up to this exception, which we will do with some comments as we proceed. The defendant called as a witness Dr. Judd, who had been one of the plaintiff's physicians at the hospital and had treated him subsequently for the neuritis, and after examining him as to the injuries resulting from the accident proceeded to examine him in regard to the neuritis, when the following proceedings occurred, as set forth on pages 201-206 of the transcript:

“Q. Have you attended him more recently?

A. Yes sir.

Q. What for?

A. Peripheral neuritis of the right arm.

Q. What was that?

MR. DUNNE. We do not see how that is material.

MR. WITHINGTON. You put it in the testimony.

MR. DUNNE. I don't understand that to be his testimony. I don't want to let that statement go unchallenged.

THE COURT. Well, there was testimony in regard to his arm.

MR. DUNNE. No, the complaint does not allege, as I recall it, that feature, any such feature as that. If it came in it came in incidentally. It was mentioned but we are not claiming that the neuritis was a necessary consequence of the accident.

THE COURT. You claim nothing then for—?

MR. DUNNE. To put it strictly and accurately we do not claim that the accident was the proximate and immediate cause of the neuritis. No sir, we stand upon the general proposition, general case. We make no special claim on account of neuritis.”

(At this stage the jury might have found either that leaving the iron works was due principally to the neuritis and that that was unconnected with the accident, or that it was due principally to the increased asthma and weakness of the back and that these were connected with the accident. The plaintiff, seeing the danger to him that the jury might find the former, sought to avoid it not only by preventing the introduction of further evidence in that direction but also by having withdrawn from the jury the evidence already introduced as to the neuritis so as to require the jury to find that leaving the iron works was due solely to the injuries resulting from the accident. The defendant thereupon, taking the position that the evidence showed clearly that leaving the iron works was due to the neuritis alone, moved to strike out both the evidence in regard to leaving the iron works and that in regard to the neuritis, as follows:)

“MR. WITHINGTON. Then I move to strike out all the testimony in regard to his having to leave the Honolulu Iron Works and the cause of his leaving, because that testimony is indissolubly connected with that. He said that he left—described: He

said 'My tools dropped from my hands. I could not pick them up. I felt as if my hand would burst. The vein was swollen down. It went down to my fingers,' and that he was treated for it."

(Whereupon the plaintiff attempted by a proposition, if not a motion, to limit the defendant's motion to the evidence in regard to the neuritis alone and entice the defendant into thinking that that was sufficient for its purposes and into making that its own motion, as follows:)

"MR. DUNNE. It can be readily stated, it seems to me, that such evidence as the plaintiff may have given concerning the condition of his right arm in that particular respect, we have no objection to its being stricken out on the defendant's motion, but—"

(But the defendant did not accept the proposed modification of its motion and adhered to its original motion by stating:)

"MR. WITHINGTON. I want to strike out *all* the testimony in regard to *that*."

(This statement is somewhat ambiguous, the plaintiff contending that "that" refers to his own last preceding statement relating to the neuritis alone, the defendant contending that it referred to its own last preceding statement relating both to leaving the iron works and to the neuritis. The latter evidently was intended, as shown more clearly by what followed, although it may not have been so understood by the plaintiff or the court. The plaintiff apparently adhered to his proposition that only the evidence as to the neuritis should go out, for he said:)

"MR. DUNNE. But we do not for a moment concede that if his tools dropped from his hands because he was weak, because his back was so weakened—"

(But the court may have thought with the defendant—a thought induced by the statements of the plaintiff, and which the court showed it already had when it remarked "you claim nothing then for—"—that the jury were merely to disregard the neuritis as an element of damages in itself and still be free to say whether leaving the iron works was due to the lame back and increased asthma or to the neuritis, for it said:)

“THE COURT. That will be a matter for the jury to determine.

MR. DUNNE. That he couldn't lift heavy weights, say.

THE COURT. I understand that. The court is ready to rule. Gentlemen, you will disregard all of the testimony given by the plaintiff with regard to his arm,—whatever disability or affection that may have had.”

(This statement of the court is ambiguous. If it had stopped with the word “arm,” it might mean that the jury were to disregard the evidence as to the neuritis for all purposes and still consider the evidence as to leaving the iron works in connection with the evidence as to weakness of the back, but it may have been intended to be limited by the subsequent words so as to mean that the jury were not only to disregard the evidence as to the neuritis as an element of damages in itself but also to disregard “whatever disability” to work resulted from the neuritis, thus leaving it to the jury to say whether leaving the iron works was due to the neuritis and, if they found that it was, to disregard the disability to work. The following statements, as well as some others set forth later, seem to indicate that the court and the defendant took the latter view:)

“MR. DUNNE. So far as he described that particular symptom.

THE COURT. So far as described, you will disregard that, the evidence in this case.

MR. WITHINGTON. Well, now, I wish to ask the witness the same question, because I wish to show—

THE COURT. Ask your question.

(Question read)

MR. DUNNE. I suppose this testimony about the peripheral neuritis would go out of the case along with the other testimony.

MR. WITHINGTON. I want to show that the cause of his having to leave the Honolulu Iron Works was peripheral neuritis and I want to show what the cause of it was and that it was in no way connected with this accident; that the cause of his leaving there had no connection at all with the accident.”

(At this point the plaintiff, apparently seeing that his view was not taken, raised a new objection to the question asked the witness as follows,—his objection previously having been that there should be no further examination in regard to the neuritis

because he claimed no damages on that account, which objection was clearly unsustainable.)

"MR. DUNNE. We shall make no objection if any inquiry is made into the professional relations between Dr. Judd and his patient. Of course that objection will be made, but just now—"

(The plaintiff contends that this statement is erroneously punctuated, the correct punctuation according to him requiring a period after the word "objection" in the first line and a comma after the word "patient," which we think was probably what he meant, but apparently either the court did not think the new objection a good one or else the court and the defendant, as well as the stenographer, understood the statement to be as set forth in the transcript, as shown by the following statements:)

"THE COURT. Well now, proceed, gentlemen. Let's ask him.

MR. WITHINGTON. I have asked the question.

MR. DUNNE. I would like to take a ruling on that matter. This neuritis proposition having been eliminated I submit that this ought to go out also, upon the same ground, and want to make—

THE COURT. Well, if the defendant can show that he was unable to perform his duties from some cause other than the alleged injury, why I think they have a right to do so. The objection will be overruled.

MR. DUNNE. Exception by plaintiff.

THE COURT. That ruling, however, is made with the understanding that the defendant is seeking to show that he was unable to perform his duties from some cause other than the alleged injury.

MR. WITHINGTON. All that testimony in regard to his leaving the Honolulu Iron Works and all claim on that account is eliminated from the case, which is one thing, but I understand distinctly that that is not and we don't want to have a misunderstanding about that.

(Question read)"

(This statement shows that the defendant had begun to realize that there was a misunderstanding as to the status of the evidence and that he desired it to be made clear, whereupon the plaintiff, without the status of the evidence being cleared

up at that point, proceeded to set forth his new objection in unmistakable language as follows:)

"MR. DUNNE. We object to that as incompetent, irrelevant and immaterial, and as an invasion of the confidential relations which subsist between a physician and his patient, under Section 1953 of the Revised Laws, under which neither a physician, an attorney or a minister of the Gospel is permitted to disclose confidential matters, and in particular any information which the physician may have acquired in attending the patient. And if they want to prove those things they must prove them by someone other than the plaintiff's physician.

(Last two or three questions and answers read)"

(The court apparently looked upon this as a new move but may not have understood it fully and did not rule until the plaintiff had gone back to his first objection based on his disclaimer of damages on account of the neuritis, whereupon the court sustained the objection, correctly so far as the new ground of objection was concerned, although not as to the old ground, which seemed all along to appeal to the court, and of course the defendant had no ground for exception and did not except. This appears from the following:)

"THE COURT. Do I understand you to object to the whole question?"

MR. DUNNE. Yes, sir, and moreover we are not claiming anything on account of this neuritis. We are not asking this jury to give him anything on account of the neuritis, which appeared in December.

THE COURT. I think the objection is well taken. The objection will be sustained.

MR. WITHINGTON. I don't intend to except to your Honor's ruling. I don't understand—

THE COURT. Objection sustained, Mr. Withington, and there is absolutely nothing before the court now."

(The following, however, took place. The defendant resumed its effort to ascertain definitely the state of the record and stated clearly what its understanding had been, namely, that the jury were to disregard the evidence in regard to the neuritis merely as an element of damages and were to consider all the evidence for the purpose of determining whether leaving the iron works was due to the neuritis or to the injuries resulting

from the accident. The plaintiff also stated definitely that he had moved that the evidence as to the neuritis alone be struck out without attempting to put this off as the defendant's motion. The court stated substantially that the jury were to disregard the evidence as to the neuritis for all purposes, thus leaving the jury no other course than to find that leaving the iron works was due solely to the injuries resulting from the accident, whereupon the defendant excepted.)

"MR. WITHINGTON. I am trying to clearly ascertain the record before determining whether I will dismiss Dr. Judd. As I understand your Honor, no testimony has been stricken out but the jury have been instructed to disregard any damages from the peripheral neuritis and the injury to the hand?

THE COURT. I didn't put it that way.

MR. DUNNE. We have asked that that matter be eliminated from the record, be stricken out.

THE COURT. The court instructed the jury to disregard all the testimony of the plaintiff regarding his arm. I don't remember just how he put it,—at any rate he testified that it was swollen, at times felt as if it might burst,—various other matters, whatever they may be the jury will entirely disregard all of the plaintiff's testimony concerning his arm.

MR. WITHINGTON. Well, then, I desire to except to the ruling because I think we have a right to have the evidence in for the purpose of showing that he received—"

(The following colloquy then occurred between the court and the defendant as to what each had understood, in which the reported words of the defendant, "I didn't move," is probably, as the defendant contends, an error for "I only moved," although the plaintiff contends otherwise and the court may have understood otherwise.)

"THE COURT. Why, you moved to strike it out.

MR. WITHINGTON. I didn't move to strike out all the evidence.

THE COURT. The court has granted your motion.

MR. WITHINGTON. No, you granted my motion in part. I except to the ruling of the court as it now stands, because the court has only granted a part and left it standing that he left there because he couldn't work. Now I want the whole or none.

THE COURT. That is for the jury to say, whether or not he was forced to leave there, because he was unable to work, not for the court to say. It will stand as passed upon.

MR. WITHINGTON. That's all, doctor."

The court properly denied the defendant's motion to strike out the evidence in regard to leaving the iron works and the neuritis together, for the plaintiff was entitled to have the whole evidence go to the jury on the question as to how far leaving the iron works was due to the increased asthma and weakness of the back resulting from the accident. The court erred in granting the plaintiff's proposition or motion to strike out the evidence as to the neuritis alone, for the defendant had a right to have that go to the jury on the question as to how far leaving the iron works was due to the neuritis and not to the injuries resulting from the accident. The defendant took an exception to this ruling. This exception was taken as soon as the defendant understood what the ruling was, and that was while the particular matter was still before the court, that is, without any intervening proceedings. No doubt the defendant was somewhat to blame for its indefiniteness of statement and perhaps it should have understood better the position of the court and of opposing counsel, but we can hardly go so far as to say that it actually induced or acquiesced in the error. If that were so, we should not set aside the verdict. On the other hand, while the particular proceedings that led up to the exception were introduced by the defendant and its motion was properly overruled, the error that was committed was induced immediately by the plaintiff and consisted in a granting of the plaintiff's proposition or motion, and both the plaintiff and the court were, like the defendant, somewhat indefinite in their language and misunderstood each other and the defendant, quite as much as the defendant misunderstood them. On the whole, considering that prejudicial error was committed, that it was induced by the plaintiff, that the defendant excepted to the ruling as soon as it understood what it was and without any intervening proceedings, and that the language of all parties was indefinite, and that there were misunderstandings all around up to the

time the exception was taken, the defendant ought to have the benefit of the exception.

On the facts as the jury found them the plaintiff was entitled to a verdict for very substantial damages. The error committed by the ruling of the court could affect only the amount of the verdict. If the error were one of excessive damages, we should give the plaintiff the privilege of avoiding a new trial by remitting a portion of the damages. But to do that when the error consisted in striking out evidence that should have gone to the jury would be to deprive the defendant of its right to have the jury pass on the amount of damages upon the proper evidence. We think, however, that, in view of the part that the defendant took in the proceedings leading up to the error, the setting aside of the verdict and granting of a new trial should be conditioned on its paying all costs to date irrespective of the final outcome of the case, and it is so ordered.

J. J. Dunne and *E. A. Douthitt* for plaintiff.

Castle & Withington for defendant.

TERRITORY OF HAWAII v. GEO. W. SMITH, SAMUEL L. RUMSEY, ALEXIS JEAN GIGNOUX, JAMES C. MCGILL, W. C. MCGONAGLE AND JAMES A. KENNEDY.

APPEAL FROM DISTRICT COURT, HONOLULU.

ARGUED JUNE 12, 1906.

DECIDED JUNE 22, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CORPORATION—*annual exhibit*.

Under Sec. 2565, R. L., persons who do business and hold themselves out as a corporation cannot be found guilty of a misdemeanor for not filing the annual exhibit of the corporation required by Sec. 2566, R. L.

OPINION OF THE COURT BY WILDER, J.

This is an appeal on points of law from the district court of Honolulu where defendants were convicted under Sec. 2565, R. L., of unlawfully doing business as a corporation in Honolulu on February 1, 1906, under the name of Benson, Smith & Co., Ltd., and holding themselves out as a corporation under that name, without having complied with Sec. 2566, R. L., in that they failed, neglected and refused to make and file a full and accurate exhibit of the state of affairs of Benson, Smith & Co., Ltd., for the year ending December 31, 1905.

Benson, Smith & Co., Ltd., was incorporated in January, 1898, all the prerequisites of the statutes having been complied with.

As correctly pointed out by the brief of the senior counsel for defendants, all the points of law resolve themselves into but practically one question, which is, whether, under Sec. 2565, R. L., these defendants can be found guilty of failing to comply with the provisions of Sec. 2566, R. L.

These two sections of the Revised Laws are as follows :

"Any person or persons who shall make a false statement in any affidavit, return, statement or certificate of stock in regard to a corporation, or who shall overvalue any property mentioned in such affidavit, statement or return, or who shall do business as a corporation or hold themselves out to be a corporation without having complied with the provisions of law, shall be held to be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five thousand dollars." R. L., Sec. 2565.

"Every corporation not eleemosynary, religious, literary or educational, shall annually present a full and accurate exhibit of the state of its affairs to the treasurer, at such times as the treasurer shall direct. The said treasurer shall have power, either himself, or by one or more commissioners appointed by him, to call for the production of the books and papers of the corporation, and to examine its officers, members, and others touching its affairs, under oath. The annual reports above mentioned, and the result of such examination, the treasurer may in his discretion lay before the governor, and also publish. In case any such corporation shall refuse to produce its books and papers upon the request of the treasurer, or the commissioners appointed by him, or in case any of the officers or members of such corporation shall refuse to be examined on oath, touching the affairs of the corporation, then the treasurer, or the commissioners, may apply to a circuit judge at chambers for an order to compel the production of the books and papers, or the examination of such officers or members of the corporation, obedience to which order may be enforced by said judge, in like manner with its ordinary decrees and orders." R. L., Sec. 2566.

Sec. 2565, R. L., as originally enacted, had a sentence at the end in regard to the jurisdiction of police justices, which sentence was repealed by the Laws of 1903, Act 8, Sec. 1.

These two sections mean the same now as they did when originally enacted, so far as this case is concerned, and consequently all that large portion of the argument on behalf of defendants about the powers of the code commission, the difference between a revision, a compilation and a code, the powers of the legislature in enacting the Revised Laws, and the claim that the Organic Act enacted the civil laws and the penal laws

of 1897 compiled by S. M. Ballou, is not in point and only tends to befog the main issue which we have already stated.

In order that defendants be guilty they must have made (1) a false statement or overvaluation of property in an affidavit, return, statement or certificate of stock, or (2) have done business as a corporation or held themselves out to be a corporation without having complied with the provisions of law. As defendants are not charged with making either a false statement or an overvaluation of property, they must come within the second classification or not at all. Even if defendants have done business as a corporation and held themselves out to be a corporation, what provision of law have they violated? It is neither charged nor claimed that any provision of law prerequisite to the formation of a corporation has been violated, but it is claimed that the defendants violated the requirement that a corporation shall annually present a full and accurate exhibit of the state of its affairs to the treasurer. The difficulty with that claim is that the statute requires the corporation and only the corporation to present such an exhibit. In brief, defendants were charged with, and found guilty of, not filing something which they are not, but the corporation is, required to file. Defendants could as well be charged with, and found guilty of, a misdemeanor in case Benson, Smith & Co., Ltd., issued bills or other evidences of debt for circulation as money, which by Sec. 2560, R. L., a corporation cannot do.

The judgment appealed from is reversed and the defendants are discharged.

E. C. Peters, Attorney General, for plaintiff.

R. W. Breckons and S. B. Kingsbury for defendants.

IN THE MATTER OF HARRY T. MILLS, AN
ATTORNEY AT LAW.

ORIGINAL.

TRIED JUNE 14, 15, 22, 1906. DECIDED JUNE 22, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ATTORNEY—*disbarred for altering document and making false certificate.*

An attorney is disbarred for materially altering an executed document without the authority of its signers and adding to it a false certificate of acknowledgment.

ORAL OPINION.

FREAR, C. J. The case is so clear that it is unnecessary to reserve the decision for further consideration or indeed to review the evidence at length. Unfortunately for the respondent the court is not obliged to decide the case solely upon oral testimony, which naturally is somewhat conflicting as between the witnesses for the prosecution and those for the respondent. The most potent evidence against the respondent is of a documentary character, supplemented, as it is, by oral testimony.

The statute (Sec. 7 of Act 67 of the Laws of 1905) provides that no liquor license shall be issued for any premises without the written consent of a majority of the property holders within a distance of one thousand feet and that that consent shall be acknowledged as are deeds when entitled to record and filed with the application. The respondent was engaged as an attorney at law to procure such consent for a liquor license for certain premises in the district of Kona on the Island of Hawaii. He obtained one of the printed forms issued by the treasury department for the purpose and filled

in most of the blank spaces with ink, but the space for the proposed licensee's name was inserted in pencil, the name being at that time "C. M. Tai." After the signatures of some, if not all, of those who signed the document, were obtained, he substituted in ink, without the knowledge or consent or authority of at least some of the signers, the name of Chang Sun in place of the name of C. M. Tai, which was erased. He also added to the document in his capacity as notary public a certificate of acknowledgment, in which he certified that all of the signers, some eighteen in number, naming them, personally appeared before him on the first day of July, 1905, and acknowledged their execution of the document, and that all of them were identified by one J. Kaelemakule, Jr., on oath,—the truth being that some of the signers did not appear or acknowledge the execution of the document at all, some of those who did acknowledge it did so on other dates, some, if not all, were not identified by Kaelemakule on oath or at all, and the respondent himself was well acquainted with a number of the signers.

This conduct shows such a want of integrity on the part of the respondent and such a lack of appreciation and disregard of the obligations of his official duty as render him unfit to be allowed to practice in the courts of the Territory or to be held out to the confidence of the public as an attorney at law.

Accordingly, the judgment of the court is that the respondent, Harry T. Mills, be disbarred and that his name be stricken from the roll of attorneys and counselors at law in the courts of the Territory of Hawaii.

M. F. Prosser, Deputy Attorney General, for the prosecution.

C. W. Ashford for the respondent.

IN THE MATTER OF THE APPLICATION OF TOM
PONG FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 12, 1906.

DECIDED JULY 2, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

REVISED LAWS—*force of new matter therein as law.*

The commission that prepared the Revised Laws was without authority to modify previous statutes so as to give them as so modified the force of law, but by Act 3 of the Laws of 1905 the legislature enacted the revision as a whole by reference and thereby gave the force of law to all of its provisions that could constitutionally be enacted by the legislature—even if the commission exceeded its authority in some instances in departing from the language of the original statutes or in inserting in constitutional form provisions that were previously unconstitutional.

Id.—*enactment of by reference—constitutional provisions as to title and three readings.*

The Revised Laws were constitutionally enacted as a whole by reference by a separate short act. It was unnecessary, in order to give the force of law to new matter therein, to incorporate its provisions in the enacting act, notwithstanding the requirements of the Organic Act of the Territory that each law shall embrace but one subject, which shall be expressed in its title, and shall pass three readings.

OPINION OF THE COURT BY FREAR, C.J.

The petitioner was tried, convicted and sentenced to pay a fine of \$50 and costs by the district magistrate of Honolulu on a complaint for violating section 1399 of the Revised Laws relating to the sale of opium, and on failing to pay the fine was committed to jail, but was discharged on habeas corpus by a circuit judge on the ground, as we understand, although there was no written opinion, that the offense was infamous and

therefore required an indictment by a grand jury. This appeal is taken from the order of discharge.

Since the offense is not infamous under the ruling in *Ex parte Higashi*, ante, page 428, which was decided after the order of discharge was made by the circuit judge in this case, the petitioner relies upon a different ground (which he relied upon also before the circuit judge but which apparently the latter did not pass upon), namely, that the statute is void. The argument is substantially as follows: Sections 1398-1401 of the Revised Laws, relating to licenses for the sale of poisonous drugs, were taken from corresponding sections (86-89) of Act 64 of the Laws of 1896, relating to licenses for the *importation and sale* of poisonous drugs; the original sections, although valid when passed by the republic as an independent sovereignty, were rendered invalid after annexation by the extension to these islands of the interstate and foreign commerce clauses of the federal constitution; and in their present form, as set forth in the Revised Laws with the parts relating to importation eliminated, these sections, although they would be valid if properly enacted by the legislature, have never been so enacted (1) because the commission that prepared the Revised Laws was without authority to make material modifications in previously existing laws so as to render them as so modified operative without further legislative sanction, and (2) because the short act by which the legislature attempted to enact the Revised Laws as a whole by reference was in violation of Sections 45 and 46 of the Organic Act of the Territory, which require respectively "that each law shall embrace but one subject, which shall be expressed in its title," and "that a bill, in order to become a law shall, except as herein provided, pass three readings in each house * * *,"—the contention being that the legislature did not intend to ratify anything that the commission may have done in excess of its authority and could not enact new legislation without embodying it in the act itself and reading it three times.

We will assume that the effect of the extension of the federal constitution to these islands was not merely to amend these sections of the original law by eliminating only such portions of them as related to importation, but that those portions were so essential that their invalidation carried with them the portions relating to sales in so far as the requirement of a license was concerned, and, further, that without the parts requiring a license for the importation or sale of poisonous drugs the part forbidding sales of opium, under the particular section now in question, except upon the written prescription of a licensed physician, irrespective of the requirement of a license, could not stand; in other words, that the four sections as they stood in the original act were rendered void in toto, and that the commission exceeded its powers in inserting these sections as modified in the Revised Laws. We may assume also, and as to this there can be no doubt, that the legislature did not attempt, and did not have the power, to authorize the commission to modify materially former laws, whether valid or void, so as to make them effective as law in their modified forms. It was not true, indeed, that the legislature authorized the commission to prepare a mere compilation of former laws in their original forms. The long period that had elapsed since the last previous revisions of the laws, the many inconsistencies that had grown up during that period, the many changes that had taken place in the form of our government, and the extension of the federal constitution and laws to these islands, required numerous alterations to be made in the laws in order to make the compilation consistent and effective and enable the legislature to act wisely in case it chose to enact the revision. The act itself (Act 45, Laws of 1903), which provided for the appointment of the commission, also shows in its recitals and in its body that the necessity of considerable alteration was recognized. Various classes of changes were expressly authorized and the compilation was to be presented to the legislature at its next session for such action as it should choose to take. The commission, while recognizing its authority to depart from original forms, recog-

nized also the limitations of that authority and as a rule when in doubt aimed to err, if at all, on the side of conservatism by departing as little as possible from the language of previous laws. This is shown by the work itself and by the report that accompanied its presentation to the legislature. The nature of the changes was described in the report and the particular changes were set forth in notes in the work itself. An act of the legislature was essential in order to give the text with its modifications of former statutes the force of law. It was for the legislature to say whether it should put the entire revision in the form of a statute with its own title and pass it through three readings, as was done with the Penal Code of 1850, which was a new code not based on previous statutes, and the Civil Code of 1859, which was a revised compilation of previous statutes with many important modifications made by the commissioners in their discretion for other purposes than to make the laws consistent and effective; or to enact the revision as a whole by a separate short act, as it attempted to do by Act 3 of the Laws of 1905 entitled "An act to enact the Revised Laws of Hawaii," and as it did in the case of the Penal Code of 1869, which was a compilation of previous laws with very little modification, and as it did when it enacted the entire common law of England with certain exceptions by a section in an act of 1892 which is now section 1 of the Revised Laws; or to provide merely that the various portions of the Revised Laws might be referred to in indictments and judicial proceedings without reference to the corresponding portions of the original laws in the original enactments, as it did in the case of the Penal Laws of 1897, which was a mere compilation of previous laws without material change; or to let the revision stand entirely on its own merits as a work of convenience without recognizing it by statute at all, as it did in the cases of the Compiled Laws of 1884 and the Civil Laws of 1897, which were mere compilations without material modifications. With full knowledge of what the commission had done, the legislature adopted the course of attempting to enact the Revised Laws as a whole by a separate short act, and the question is whether that attempt was effectual.

The act to enact the Revised Laws embraces but one subject and that is expressed in its title. It also passed three readings in each house. It therefore complies with the provisions of the Organic Act in question unless it is necessary to incorporate in an act in full, and not merely by reference, all that is to be made law by the act. The petitioner concedes that the act would be sufficient if, or in so far as, the Revised Laws contained only former laws without material change but contends that a body of law cannot thus be enacted by a separate act if, or in so far as, it contains new provisions. It is difficult to see why a legislature should attempt to enact a revision if such enactment would be operative only as to such parts as set forth former laws without change, and it is equally difficult to see why a legislature could not enact an entire revision or code that contained some material modifications of previous laws if it could enact a compilation that did not contain any new provisions. We, however, will not pursue the argument further except by referring to a few cases and quoting passages from the opinion of the court in one of the leading cases upon the subject. The case is that of *Central of Georgia R. Co. v. State*, 104 Ga. 831 (42 L. R. A. 518). The same contentions were made as in this case; the commission had materially modified one of the former laws and the legislature had attempted to enact the entire code by a separate short act; and similar constitutional provisions were invoked to show that the legislature could not enact the code in that manner.

The court said, among other things, as to the powers of the commission and the intention of the legislature:

"It is insisted that by the act approved December 19, 1893, providing for the appointment of three commissioners to codify the laws of Georgia, these commissioners were simply empowered to codify and arrange in systematic and condensed form the laws then in force in the state, and had no authority whatever to embody in the Code any new law, or any provision which modified any existing law of the state. No one would hardly pretend that any new matter in the Code derives force or efficacy by virtue of the act of the commissioners alone. Even if the legislature had attempted to confer upon the commissioners

the power to make changes in the law, and to embody in the Code such new matter as they saw proper, such an act of the legislature, in so far as its purpose was to thus create new legislation for the state, would have been an absolute nullity. Enacting and changing laws for a state devolved by the Constitution upon the legislative branch of its government, and that branch cannot delegate the power to another. A consideration, therefore, of the duties and powers imposed upon the Code commissioners, can throw no light upon what construction should be given an act of the legislature adopting their work. If the codifiers introduced any new matter in the Code, it, of course, amounted to nothing unless it afterwards was enacted into statute by legislative sanction. Where such matter is not inherently unconstitutional,—that is, where it embraces nothing that is not a proper subject-matter of legislative enactment,—there can be no question but that the legislature has the power to enact it into law or not, as it seems proper. When the work of the commissioners was completed, it was laid before the legislature. It had the power to reject that work or to accept it, and in its acceptance it had the power simply to provide for the pay of the commissioners, and the publication of their work for the use of the public; and, if nothing more was done, there would have been a want of legislative sanction to any new matter embodied in the Code, and hence such new matter would never have had any validity. The vital question, then, in this case, is not what the commissioners had the power to do, but what the legislature intended to do with their work. That intention can only be gathered from what the legislature itself has deliberately declared when it finally passed upon the work reported to it by the commissioners. This final action of the legislature is embodied in what is known as the 'Adopting Act' of the Code, approved December 16, 1895. Section 1 of that act declares: 'That the code of laws prepared under its authority by John L. Hopkins, Clifford Anderson and Joseph R. Lamar, and revised, fully examined, and identified by the certificate of its joint committee, and recommended and reported for adoption, and with the acts passed by the general assembly of 1895 added thereto by the codifiers, be, and the same is, hereby adopted and made of force as the Code of Georgia.' This portion of the body of the act is covered by these words in the title, 'An Act to Approve, Adopt, and Make of Force the Code of Laws Prepared under the Direction and by Authority of the General Assembly,' etc. A legislative body should always be

presumed to mean something by the passage of an act. If, as contended by plaintiff in error, the legislature by this act intended to adopt such provisions in this Code as were law any way, without any further legislative sanction whatever, then the act in question is absolutely meaningless. It would give no more force or effect to the Code of 1895 than such a work would have carried with it emanating from a private source, and without any legislative warrant or authority whatever. The code of laws designated and identified in the act was adopted and made of force as the Code of Georgia. Not a part of the Code was then made of force, but the entire Code, as compiled by the commissioners. It would be difficult to conceive how language could more clearly or forcibly express the real intent of the legislature in this matter than the words used in the title and the body of this act. If it means anything, it means a purpose of the legislature to adopt and make of force a code of laws, and hence to breathe into every provision in that code the validity of a legislative enactment. Any other construction would ascribe to the legislature the folly of declaring, in effect, 'We adopt as law in this code everything which would be law any way without further sanction.' * * *

And as to the requirement of three readings:

"One attack made upon the adopting act is that it does not contain in its body any of the various provisions of the law which it seeks to declare of force, and that under the constitutional provision above cited it was necessary that these provisions should have been embodied in the act, and should have been read three times before their passage. If this contention be correct, then a large body of our laws, many of which have been enforced for a century, are unconstitutional and void. The act of 1872 revived the colonial statutes by mere reference, and without embodying them in the act itself. The act of 1874 adopted the common law of England. These laws were passed under a constitution which required bills to be read three times in the house and twice in the council; and the common law not only was not so read, but very few, if any, of the legislators knew all of its provisions. * * *

And as to the provision in regard to the title:

"This presents the only question in the case which, to our minds, is at all difficult of solution. An act adopting a code necessarily, in one sense, refers to a great many subjects, and enacts into statute provisions not germane one to another. We

have, however, after much reflection, thought, and research, reached the conclusion that the position of the able counsel of plaintiff in error is founded upon a misconception of the real meaning and the purpose of the provision in the Constitution above quoted. * * * A bill may contain more than one subject, and yet, if its title clearly indicates all its subjects it will not be apt to mislead the legislature as to its intent and scope and cannot, therefore, be considered surreptitious legislation. Experience, however, taught that it was often the case that many matters were embraced in the same bill adverse in their nature, and having no necessary connection, with the view of combining in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits. It was to prevent this dangerous practice that our organic law declares that a bill should contain but one subject-matter. An act, however, adopting a code, or a system of laws, obviously does not fall within any of the classes of mischiefs which this restriction in the constitution was intended to remedy. No one need be misled by a title to an act which declares that its purpose is to adopt a certain code or system of laws nor is there anything in such an act to occasion any alarm that it would pass contrary to the wishes of the people by virtue of improper combinations among members of the legislature. What the Constitution looks to is unity of purpose. It does not mean by one subject-matter only such subjects as are so simple that they cannot be subdivided into topics; but it matters not how many subdivisions there may thus exist in a statute, or how many different topics it may embrace, yet if they all can be included under one general, comprehensive subject, which can be clearly indicated by a comprehensive title, such matter can be constitutionally embodied in a single act of the legislature. On the other hand, should the legislature embody in one act two or more different subjects, however simple they may be, which have no relation or connection whatever one with the other, the Constitution is violated. * * *

See also *Mathis v. State*, 31 Fla. 291 (12 So. 681); *Dew v. Cunningham*, 28 Ala. 466 (65 Am. Dec. 362); *Bales v. State*, 63 Ala. 30. These cases are cited as particularly in point in view of the circumstances and arguments in the present case. See also *Republic v. Parsons*, 10 Haw. 601.

The only case relied on contra is that of *Lewis v. Dunne*, 134 Cal. 291, which, however, is easily distinguishable from

this case. The decision in that case was based on the two grounds, (1) that the act was an act, not to enact the code as a whole, but to revise it by changing numerous sections in it without reenacting and publishing at length as revised the whole code as required by a special provision of the constitution, which is not found in the Organic Act of this Territory, and (2) that it did not comply with the provision that each act should have but one subject which should be expressed in its title, which is found in our Organic Act. That was an act covering 150 pages, amending over 400 sections, repealing nearly 100 sections, changing the numbers of other sections and adding a great many new sections. It dealt with a vast variety of subjects, many of which were totally distinct from each other and had no relation to civil procedure, and purported to be a revision of the code of civil procedure, which was the title given for convenience to merely one of four volumes of codes, and that particular volume was not confined to any particular subject or subjects but included substantive law, criminal law and legislation that might be classed under any other category than that of civil procedure. One member of the court dissented on the second ground and the majority of the court based its decision on that ground in part upon an express provision of the constitution declaring all its provisions mandatory and declined to express an opinion upon the question whether even under the special provisions of that constitution the legislature could not enact by reference an entire code of civil procedure. If that case were in point it would be contrary to a practical unanimity of opinion expressed by other courts, but, as already stated, it is not in point. In the lengthy note to that case in 55 L. R. A. 833, the conclusion is reached that,

“A code of laws or of procedure need not be embodied in an act adopting it, but a reference therein to the code adopted is sufficient. A constitutional requirement as to the reading of a bill in each house is sufficiently complied with in the case of a code if the act adopting it is duly read without reading the code itself. A provision exists in the constitution of nearly all the states that every act shall have but one subject (or object,

in a few cases), which shall be expressed (or embraced) in its title. * * * The authorities seem to be uniformly to the effect that such provision does not prevent the original enactment of a code. * * * It would seem that the original enactment of a code or general statutes under the title 'An Act to Adopt a Code of Laws,' or some similar title, could not come within this evil; and the courts have uniformly held such a title sufficient where the question has been directly involved."

No sufficient cause being shown for the discharge of the petitioner, the order appealed from discharging him is reversed and he is remanded to the custody of the sheriff.

G. D. Gear for petitioner.

E. A. Douthitt, County Attorney, for respondent.

IN THE MATTER OF THE APPLICATION OF THE
PACIFIC OIL TRANSPORTATION COMPANY, A
CORPORATION, PETITIONER FOR A WRIT OF
MANDAMUS DIRECTED TO JAMES BICKNELL,
AUDITOR OF THE COUNTY OF OAHU.

IN THE MATTER OF THE PETITION OF THE SCHU-
MAN CARRIAGE COMPANY, LIMITED, A COR-
PORATION, PETITIONER FOR A WRIT OF MAN-
DAMUS DIRECTED TO JAMES BICKNELL,
AUDITOR OF THE COUNTY OF OAHU.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 27, 1906.

DECIDED JULY 3, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COUNTIES—*power to maintain parks.*

The county of Oahu has power to appropriate county funds for the maintenance and up-keep of Kapiolani Park and the roads therein.

OPINION OF THE COURT BY WILDER, J.

These two cases were argued together and are appeals from judgments granting peremptory writs of mandamus against the county auditor of Oahu to compel him to issue warrants on the country treasurer to pay two claims against the county, which claims have been examined, allowed and ordered to be paid by the board of supervisors, one for a certain amount of oil for a road in Kapiolani Park and the other for repairs to a dray used in that park.

The question to be decided is, whether the county of Oahu has power to appropriate county funds for the maintenance and up-keep of Kapiolani Park.

As to the claim for the oil, there is no question but that that is a lawful and valid one. The county has express power to maintain "public streets, highways, roads, alleys, trails and bridges within its boundaries," (County Act, Sec. 9, subdivision 3,) and whether a road, on the maintenance of which county funds are spent, is within or without Kapiolani Park, is immaterial.

The other claim depends on the construction of subdivision 2 of Sec. 9 of the County Act, which reads as follows: Each county shall have the power "to purchase and otherwise acquire, take on lease and hold real and personal property within its defined boundaries and to manage and dispose of the same as the interests of the inhabitants thereof may require."

The general rule, as stated by Mr. Dillon, is that "A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." 1 Dill., Mun. Corp., Sec. 89.

The county having the power to purchase, hold and manage (which includes power of maintaining) property such as that

comprised within the limits of Kapiolani Park, it is to be fairly implied therefrom that the county also has the power to maintain such property without purchasing and holding it, and therefore the second claim is also legal and valid.

The judgment appealed from in each case is affirmed.

E. C. Peters, Attorney General, for petitioners.

E. A. Douthitt, County Attorney, for respondents.

FRANK GODFREY, TRUSTEE, v. HELEN ROWLAND.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 8, 1906.

DECIDED JULY 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EJECTMENT—evidence—authentication of clergyman's record of baptism—wife's testimony as to non-access—cross-examination—evidence of being lawfully begotten.

Plaintiff as trustee for T. M. brought ejectment for T. M. as the only surviving lawfully begotten child of F. M. (1) A clergyman's entry of the baptism of W. T. M., shown to be T. M., was authenticated by proof of his handwriting, he being in Australia. Held: No error. (2) The wife of F. M., having testified for the defendant that she had two other sons living, born after she had become separated from her husband, the plaintiff showed by her testimony in rebuttal non-intercourse with her husband after they had become separated and until his death, the sons having been born several years after the separation began. The defendant was not allowed to cross-examine her concerning her illicit relations with the plaintiff. Held: The evidence was inadmissible under the rule in *Goodright v. Moss*, Cowp. 591, which appears to be law in England still and to have been adopted generally in the American cases, but the evidence and the refusal to allow cross-examination were harmless in the view that the verdict can stand for the plaintiff even if the sons George and Harry, designated in the evidence of the defendant, were co-tenants.

OPINION OF THE COURT BY HARTWELL, J.

(Frear, C.J., Dissenting.)

This was an action of ejectment in which the plaintiff obtained a verdict. At a former trial the defendant obtained a verdict which was set aside. 16 Haw. 377. The plaintiff claims the land as trustee for Thomas Metcalf the lawfully begotten son of Frank Metcalf to whom it was devised for life over in fee to his lawfully begotten children. We held in this case (p. 389) that the conveyance in fee from the life tenant to Helen Rowland, who would have taken on his dying without lawfully begotten children surviving, did not cut off the contingent remainder to his children; and (p. 383) that in order to prove the legality of a marriage between Frank and Alice Metcalf it was not necessary to prove that a license to marry had been issued since "legitimacy cannot be made to depend upon the proof or want of proof of the performance by any official of a merely clerical duty."

Exceptions 1 to 9 relate to evidence of the wife, Alice Metcalf, concerning non-intercourse with her husband; 10, 11 and 12, to admission of evidence of marriage license record without proving handwriting of the entrer or accounting for his absence were abandoned in argument in view of the former ruling; 12 and 13, to refusal to allow defendant to ask Alice Metcalf in cross-examination if she had illicit relations with the plaintiff; 14, to refusal to admit evidence of the conveyance from the life tenant to Helen Rowland (we do not consider this exception since the question it presents comes within the former ruling); 15, 16, 17 and 18, to admission of evidence of a record of baptism; 19, to refusal to instruct the jury (1) that their verdict if for the plaintiff, could not be for more than an undivided one-third; or (2) that "In connection with evidence that no sexual intercourse took place between Frank and Alice, it is also competent for defendant to show, (A) the adultery of the mother at or about the time of the child's conception, (B) the

habits in life of Frank and Alice, (C) their reputation in the family, (D) their conduct toward the child at the time of its birth, (E) the character of Alice Metcalf, (F) her general reputation for chastity, (G) other facts admitted in evidence and bearing on the probabilities of the case. If you find that the defendant has established these facts by clear and convincing evidence, they may be considered by you in arriving at your conclusion whether Thomas is legitimate or illegitimate;" or that (21) "It is not important whether the child baptized William Thomas Metcalf on February 26, 1882, is alive or dead unless by affirmative evidence the plaintiff can show that such child was the Tom who is alive now. It cannot be presumed that the child baptized then as William Thomas Metcalf is Thomas Metcalf" (there was such evidence in the case and therefore the instruction was not required); or that (22) "In passing upon the question whether George and Harry are legitimate or illegitimate, I instruct you to entirely disregard any evidence by Alice tending to show that Frank did not have sexual intercourse with her at or about the time of their conception. A mother is not allowed to give such evidence for the purpose of having her issue claimed to have been born in lawful wedlock declared illegitimate; 23, to the instruction which the court of its own motion gave, that in passing on the legitimacy or illegitimacy of George and Harry "the testimony of either husband or wife that they did not cohabit together or have sexual intercourse with each other is not, alone, sufficient to prove non-intercourse or non-cohabitation between them. The testimony of either may be considered in connection with any other evidence adduced tending to prove such lack of sexual intercourse or cohabitation;" 24, to instructing the jury, at the plaintiff's request, that "In order that Thomas Metcalf should be found to be the lawfully begotten child of Frank Metcalf it is necessary that his parents should have been married prior to his birth, but in this connection I instruct you that in order to find a valid marriage it is not necessary to show the

issuance of a marriage license, nor is it necessary to show any ceremony, provided that the evidence shows that the parties were in fact married. The fact of marriage may be proved by any kind of evidence, whether direct or circumstantial" (the instruction was required by the former ruling); 25, 26 and 27 to the verdict as contrary to law, etc., to denial of motion for judgment non obstante as to two-thirds of the property sued for and of defendant's motion for new trial on grounds presented at the trial.

The defendant's brief treats first the subject of the baptismal record, claiming that the entry could not be authenticated by proving the handwriting of the entrer who was in Australia. It is claimed that upon the best considered cases and on principle this exception to the hearsay rule is confined to cases in which the person making the entry is dead or, at least, in which unavailing efforts to obtain his testimony are shown to have been made. Her attorneys say that they have been able to "find no English cases, early or late, where absence from the jurisdiction has been held sufficient," and that they "feel safe in asserting that in England the death of the entrer is a *sine qua non* to the admission of his entries," making the following citations: 1 Phillips on Evidence, 255, 259, 263; *Cooper v. Marsden*, 1 Esp. 1; *Stephen v. Gownap*, 6 Mew's Dig. 566; *Welch v. Barrett*, 15 Mass. 380, 385; *Nichols v. Webb*, 8 Wheat. 334; *Browning v. Flanagan*, 22 N. J. L. 567; *Brewster v. Doane*, 2 Hill 537; *Merill v. R. Co.*, 16 Wend. 586, 595; *Kennedy v. Doyle*, 10 Allen, 161, 165; *McKeen v. Bank*, 54 Atl. 49, 52.

The citation from Phillips on Evidence refers to entries of a business nature coming under the heading of "Declarations Against Interest," followed by the topic, "Admissibility of the Books of Deceased Rectors or Vicars," in which it is said, "It is essential in such cases that the rector or vicar whose books are offered in evidence appear to be dead."

The text books ordinarily mention the conflict of the American decisions on this subject. 2 Jones on Evidence, 727.

"It is indispensable for the use of these statements, that the entrant be unavailable as a witness. Death is usually spoken of as the condition on which they may be used; and death is certainly sufficient. Absence from the jurisdiction should equally suffice. On the same principle, insanity and illness hindering the presence of the witness should equally suffice; and in general 'the ground is the impossibility of obtaining testimony, and the cause of such impossibility seems immaterial.'" 1 Greenleaf on Evidence, Ed. 16, 204.

"The regular entries of a minister or a physician, concerning the services performed as a part of his occupation, fulfil adequately the demands of that Exception. Its peculiar limitation, however, is that the entrant must first be accounted for as deceased, out of the jurisdiction, or otherwise unavailable." 3 Wigmore on Evidence, 2004, suggesting no conflicting decisions.

The minute book of a bank messenger, who had absconded and was shown to be out of the jurisdiction of the court, containing a memorandum of notice of non-payment of a note given by him in the performance of his duties, was allowed to be shown on proof of his handwriting. The court, Shaw, C. J., after observing that the books of an insane bank clerk, kept in the regular course of his business, had been admitted on proof of his handwriting in *Union Bank v. Knapp*, 3 Pick. 96, said:

"The only distinction between these cases and the case at bar is, that here, for aught that appears, the witness is still living. But it was satisfactorily proved, not merely that the witness was out of the jurisdiction of the Court, but that it had become impossible to procure his testimony. We cannot distinguish this, in principle, from the case of death, or alienation of mind. The ground is, the impossibility of obtaining the testimony; and the cause of such impossibility seems immaterial." *North Bank v. Abbot*, 13 Pick. 471.

If business entries can thus be shown in order to substantiate money claims, there is far more reason for allowing authentication of entries of marriages, births, deaths or baptisms made

by a clergyman in the performance of his clerical duties and in the making of which he is supposed to have had no personal object in view other than to perform his duty.

We think that the entry was properly authenticated in this case although no effort appears to have been made to bring here the clergyman who made the entry from the Diocese of Adelaide in Australia, where he was. We are also inclined to think that the objection to the authentication was waived by the defendant. When the witness was called to prove the handwriting of the entrer, upon the defendant's objection to the introduction of the book in which the entry was made, the court ruled that only the name of the person baptized and date of baptism were admissible and instructed the jury accordingly. The witness having then been allowed to read to the jury the entry of the baptism, the defendant moved to strike out his evidence on the ground that the record was not offered as well as for other grounds above mentioned. The plaintiff afterwards recalled the witness and offered in evidence four entries from the record, recording the baptism of four Metcalf children including that of William Thomas Metcalf, when the defendant objected to showing merely these entries, claiming that "the whole book should be offered and not merely these entries," and, in cross-examining the witness, offered "the whole book in evidence as the baptismal record of St. Andrews Cathedral Church," doing this, her attorneys said, without waiving her objection, which the court had overruled, to the introduction of the four entries. The court, after saying that she might make any reservation that she desired, asked her counsel if they offered the whole record of baptism, to which they answered "It can all go in. It does not matter whether they are all births, marriages or deaths, it is all receivable." The defendant's object in putting in the whole book was to show a different handwriting in the other entries and thereby discredit the evidence as to the handwriting of the entries shown by the plaintiff. This was an attempt to get the benefit without taking the burden.

As to the refused instruction referred to in exception 19 (2), the defendant asked that each subdivision be given separately, if any were refused, and excepted generally to the refusal to give any portion. A separate exception ought to have been taken to the refusal of each separate and distinct portion of the instruction since it is difficult to sustain an exception in part and overrule it in part. Be this as it may, however, the 20th instruction, given at the defendant's request, went as far as, and probably further than, she could properly ask the court to go in this direction, namely, "The fact of legitimacy may be proved in the same manner as any other fact in a court of law and by either direct or circumstantial evidence. The presumption of legitimacy only stands until encountered by evidence which proves to the satisfaction of the jury that sexual intercourse did not take place at or about the time of conception."

The competency of Alice Metcalf's testimony of non-intercourse with her husband after they were separated is next considered. The rule, as stated in *Goodright v. Moss*, Cowp. 591 (1777), ejectment, that "The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage," has been followed in many cases in England and America. In *Rideout's Trusts*, 10 Eq. 41 (1870), the court said, in respect of the husband's affidavit of non-cohabitation with his wife, "I am afraid you must give me some other evidence," but that, in respect of his affidavit of the wife's visit to Paris after their separation, "If that be put in evidence it will afford so strong a presumption that I think I can assume the fact of non-access on that occasion." In *Yearwood's Trusts*, 5 Ch. Div. 545 (1877), the court admitted a husband's affidavits showing the illegitimacy of certain children born during marriage, doing this on the strength of the decision *In Re Rideout's Trusts* in the supposition that that case "treated the evidence as admissible but not to be acted upon unless corroborated by other evidence." In *Nottingham v. Tomkinson*, 4 C. P. D. 343 (1879), the court refused a husband's evidence of non-access, expressing the opinion that the

judgment *In Re Rideout's Trusts* was not opposed to its decision and that the tendency of that case "was in the opposite direction to that supposed by Hall, V. C., *In Re Yearwood's Trusts*." Again, in *Burnaby v. Baillie*, 42 Ch. Div. 282 (1889), in declining to receive such evidence, the court said: "The view taken by Vice Chancellor Hall *In Re Yearwood's Trusts* seems to me founded on a misapprehension of *In Re Rideout's Trusts*," citing the *Nottingham case* and also *In Re Walker*, W. N. 196 (1885), in which "Mr. Justice Kay declined to follow *In Re Yearwood's Trusts*, and held that the evidence of the husband to prove non-access could not be received."

It is true that *Anon. v. Anon.* 22 Beav. 481, 23 Id. 373 (1855), excluding testimony of non-access before marriage, were overruled in the *Poulett Peerage case*, Ap. Cas. 399 (1903), but there is no English decision, of which we are aware, clearly overruling the principal case. Several cases are cited in Wigmore on Evidence, Sec. 2063, showing that the law was held otherwise prior to *Goodright v. Moss*, and in *R. v. Luffe*, 8 East 1903 (1807), the court, referring to a filiation order granted below, said that the objection was that the order was founded on the wife's evidence only, and that "there must be other proof of non-access," meaning, he says, "other sufficient testimony;" and so in several American cases the evidence appears to have been admitted "when corroborated by other evidence," but whether sufficient in itself, or only when corroborated, to prove non-access, is not quite clear. But the rule, as stated by Lord Mansfield in *Goodright v. Moss*, has generally been adopted in the American cases. *Rabeke v. Bare*, 115 Mich. 328, 69 Am. St. Rep. 567 and note.

But the plaintiff claims that the verdict, nevertheless, can stand since, if he were a tenant in common with the sons George and Harry, he would be entitled to possession of the land to the exclusion of the defendant who has shown no right under either of them. The plaintiff frankly says that the claim is presented for the first time in his supplementary brief and did

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not occur to him at the trial. The defendant, however, insists that the presentation of the claim is inadmissible at this time because the case was tried on the theory that if the plaintiff showed no more than the interest of a tenant in common the verdict and judgment would have to be limited accordingly. But no instruction conceding this was asked for by the plaintiff. Whether he acquiesced in instructions upon the opposite theory or excepted to them would not appear in the defendant's bill of exceptions; but if he did not except to such instructions he is not bound to treat them as the law of the case as affecting his right to present this claim for the evidence was then all in and the defendant was not induced thereby to withhold any evidence to show a right, if any she had, under either or both of the sons, George and Harry, whom she claimed to be the persons rightfully entitled. No statement was made by the plaintiff that he would not demand a verdict for more than one-third if it should appear that that was all that he owned. We think, therefore, it is proper to consider this claim for if it is good law the error in admitting the wife's testimony as well as in refusing to allow her to be cross-examined upon her relations with the plaintiff and the other rulings and instructions upon the subject, which were excepted to, would be harmless.

Upon principle there is no reason why an intruder or trespasser upon land, having no right there, should object to being put off by process of law invoked by one only, and not by all, of the co-owners. Each co-tenant has a right to enjoy possession of all of the common property undisturbed by unauthorized outsiders. It is not necessary that one co-tenant in seeking to oust a disseizor should act or profess to act for the interests of any one but himself. Tenants in common may join in bringing ejectment, (*Aylett v. Keaweamahi*, 8 Haw. 320,) but they are not obliged to do so. *Nahinai v. Lai*, 3 Haw. 317; *Ung Wong v. Kan Chu*, 5 Id. 225.

But the defendant insists that, even if plaintiff, claiming as sole owner but showing that he is only a co-owner with others,

would be entitled to a verdict, the verdict must be limited to the interest shown and cannot be a general verdict entitling him to be placed in possession to the exclusion of the defendant. If this were an action to quiet title requiring adjudication of the extent of the title of all the parties showing ownership or if it were in the nature of an equity suit requiring a declaration of titles or were subject to statutes prevailing in code states requiring that the real parties in interest be either plaintiffs or defendants, then the verdict, like a declaratory decree in equity, would properly find the extent of the titles.

In our practice a verdict in ejectment is 'for the plaintiff' or 'for the defendant' and, if for the plaintiff, is followed by a judgment that he have restitution of the premises. On this judgment a writ of restitution issues requiring the officer to place the plaintiff in exclusive possession. If the defendant showed a right of possession a special verdict would be proper defining the respective rights of the parties. It is to be observed that while, as frequently remarked in decisions of this court, ejectment, with us, is used for the trial of title, the judgment, following the statutory form of the petition, is merely that the plaintiff have restitution of the premises and does not declare his title.

The defendant in this case by showing, as she claims to have done, and, as we assume, for the purpose of considering this question, that she has done, that two others, namely, the sons George and Harry, besides the plaintiff, were entitled to the property, but failing to show that she held under either of them, would be estopped from showing it in any subsequent proceeding between herself and the plaintiff; so a verdict for the defendant would have estopped the plaintiff from afterwards showing, as against her, that he had any less interest than the whole. The plaintiff recovers by his showing of a paramount title to one-third, and right of possession to all, of the property.

There is great conflict in the decisions elsewhere concerning the right of a plaintiff to sustain a verdict under the circum-

stances of this case. *Treat v. Riley*, 35 Cal. 129; *Dolph v. Barney*, 5 Ore. 194; *Sherin v. Larson*, 28 Minn. 523; *Johnson v. Tilden*, 5 Vt. 525; besides Connecticut and Florida cases sustain the view here taken, but it is discarded in other states, as Kansas, Virginia, Missouri, Illinois, Massachusetts and Pennsylvania.

In *Hardy v. Johnson*, 1 Wall. 371, the plaintiff brought ejectment claiming ownership but the jury found that he had only an undivided one-twentieth interest. The court held that "as the defendants had shown no title he was entitled to the possession of the entire premises," and this ruling was affirmed on error as "correct under the system of pleading and practice which prevails in the State courts of California and which, with some slight modifications, has been adopted by the Circuit Court of the United States for common law cases."

The reasoning of decisions on either side of the question is not always satisfactory. In real actions like *Dewey v. Brown*, 2 Pick. 387, which was a writ of entry, the defendant's title is required to be adjudicated, hence a co-tenant's right should be defined by the verdict. It is difficult to see why a verdict for the plaintiff on a claim of the entirety is supported on his showing of a co-tenancy in cases in which the defendant is a mere intruder and not equally so in cases in which the defendant holds over without right and refuses a demand to let into possession a rightful, if not the only, owner. The occupant is a disseizor in one case as well as in another.

Many decisions, which are against the view we take, are based upon code provisions requiring that every action be brought in the name of the real party in interest and that "those who are united in interest must be joined as plaintiffs or defendants." *Mattox v. Boggs*, 19 Neb. 648, (in which the court remarked that the Connecticut cases contra were "decided prior to the enactment of any statute similar to the provision of our code.") We are, therefore, unable to distinguish this case from *Kwong Lee Wai v. Ching Shai*, 11 Haw. 444, in which a

verdict for the plaintiff was sustained although the plaintiff showed title in only an undivided one-half, the court having refused to instruct the jury that the "plaintiffs, not having shown that they had title to all the land, cannot recover in any event for more than one-half."

In *Doe v. King*, 6 Exch. 789, it did not appear how many co-tenants there were with the plaintiff. This of itself was sufficient reason for the decision although the dissenting opinion of Platt, B., states the law, we think, as applicable to this case:

"It is true that, in ejectment, the title of the lessor is in issue; but the object of the action is to recover the possession from a trespasser. Now, a tenant in common is the owner of the whole estate in common with his co-tenants; therefore, as soon as he has proved his right to the possession in common with others, and that the defendant, having no such right, is a wrongdoer as against him, he is, in my opinion, entitled to a general verdict, for the purpose of recovering possession of the whole. It is no answer to say that the sheriff can only put a lessor of the plaintiff in possession of such a share of the premises as he has recovered. I agree that where different persons claim certain portions only, the verdict ought to be limited accordingly. The observation with reference to estoppel seems to me not to apply, because, in an action for mesne profits, the damages might be limited to the proportion of the premises to which the plaintiff was entitled."

Upon the whole we think that the verdict ought to stand.

Exceptions overruled.

A. G. M. Robertson and C. F. Clemons (Thompson & Clemons with them on the brief) for plaintiff.

E. B. McClanahan and S. H. Derby (Kinney, McClanahan & Derby on the brief) for defendant.

DISSENTING OPINION OF FREAR, C.J.

I dissent on the last point, though not without hesitation. for I realize that much can be said on the other side both in reason and on authority, and yet I feel that the weight of both

reason and authority favor the view that a tenant in common should not be permitted to recover more than his aliquot part even from one who has not title, and especially when, as in this case, he claims in hostility to his alleged cotenants as well as to the defendant and the latter is not a mere intruder or trespasser but has been in possession long and under color of title.

The text books as well as the cases are well divided on this question. Warvelle, for instance, (Ejectment, secs. 122-124) thinks that on principle one tenant in common should be permitted to recover the whole as against a stranger, except perhaps when, as in this case, he does not recognize his alleged cotenants, but he concedes that the "volume of authority" is against that view. Jones (2 Real Property, secs. 1936, 1937), on the other hand, thinks that on principle a tenant in common should be permitted to recover only to the extent of his title, but states that the weight of authority is against him. Evidently he was mistaken as to the weight of authority being against him.

The rule at common law was that the plaintiff could recover only his share and there appears to me no adequate reason for reversing that rule. It is supported by the English courts, the federal courts, and, as it is said, the courts of Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Pennsylvania, South Carolina and Virginia, though I have not examined some of the cases cited in the text books and digests from these courts and others do not seem to be very satisfactory, and some are based in part on statutes. The following are among the most satisfactory: *Doe v. King*, 6 Exch. 791; *Stevens v. Ruggles*, 5 Mason 221 (per Story, J. of the federal supreme court); *Whittle v. Artis*, 55 Fed. 919 (the federal cases *Hardy v. Johnson*, 1 Wall. 371, *French v. Edwards*, Fed. Cas. No. 5098, and *Le Franc v. Richmond*, Fed. Cas. No. 8209, hold merely that the contrary is the

law in California); *Dewey v. Brown*, 2 Pick. 387; *Buttrick v. Tilton*, 141 Mass. 93; *Gray v. Givens*, 26 Mo. 303; *Baber v. Henderson*, 156 Mo. 566; *Marshall v. Palmer*, 91 Va. 344 (21 S. E. 672); *Nye v. Lovitt*, 92 Va. 710 (24 S. E. 345); *Mobley v. Bruner*, 59 Pa. St. 481; *King v. Hyatt*, 51 Kan. 504 (32 Pac. 1107); *Minke v. McNamee*, 30 Md. 294 (96 Am. Dec. 577); *Martin v. Neal*, 125 Ind. 547; *Johnson v. Hardy*, 43 Neb. 368; *Stearn v. Lloyd*, 128 Ill. 493; *Keefe v. Doreland*, 16 Mont. 16; *Parrott v. Dyer*, 105 Ga. 93 (31 S. E. 417); *Harrelson v. Sarvis*, 39 S. C. 14 (17 S. E. 368); *Young v. Adams*, 14 B. Mon. 127 (58 Am. Dec. 654); *Hall v. Dodge*, 38 N. H. 352; *Hughes v. Holliday*, 3 Gr. 30.

The opposite view is favored by the courts of California, Colorado, Connecticut, Florida, Minnesota, Nevada, North Carolina, Oregon, South Dakota, Texas, Vermont, Washington and West Virginia. See *Williams v. Sutton*, 43 Cal. 65; *Newman v. Bank*, 80 Cal. 368; *Weese v. Barker*, 7 Colo. 178; *Barrett v. French*, 1 Conn. 354; *Simmons v. Spratt*, 26 Fla. 461 (9 L. R. A. 343); *Sherin v. Larson*, 28 Minn. 523; *Brown v. Warren*, 16 Nev. 228; *Foster v. Hackett*, 112 N. C. 546; *Dolph v. Barney*, 5 Or. 191; *Mather v. Dunn*, 11 S. D. 196; *Hibbard v. Foster*, 24 Vt. 542; *Robinson v. Sherwin*, 36 Vt. 69; *Allen v. Higgins*, 9 Wash. 446; *Telfender v. Dillard*, 70 Tex. 138; *Voss v. King*, 33 W. Va. 236 (10 S. E. 402). Some of these cases, like some on the other side, are unsatisfactory because of their indefiniteness and failure to state reasons. In some the opinion upon this point is expressed merely obiter or arguendo. In some the decisions are based in part at least on the mistaken view that tenants in common, like joint tenants, hold *per tout* as well as *per my*, and in some on the mistaken view that it was the rule at common law that one cotenant might recover all. Some of these courts place emphasis on the fact that in their jurisdictions ejectment is a mere possessory action and not, as in some other states and here, an action to try title as well. One of these courts, that of North Carolina, while holding that a verdict for all may be sustained, holds also that

such a verdict cannot be demanded as a matter of right and that the usual and better practice is to award to a cotenant only his aliquot part, in order to avoid practical difficulties that would otherwise be likely to arise afterwards in the execution of the judgment and in the use of the judgment as an estoppel in future litigation—difficulties which will be referred to more fully below. See particularly *Pierce v. Wanett*, 32 N. C. 446. A common ground for holding that one cotenant may recover all is that he represents his cotenants as well as himself, and consequently the courts that hold that way state either affirmatively that one may recover all if he recognizes his cotenants (see, for instance, *Barrett v. French*, 1 Conn. 354, supra) or negatively that he cannot recover more than his share if he acts for himself alone and in hostility to his cotenants (see, for instance, *Cromwell v. Holliday*, 34 Tex. 464). Such cases as applied to the present case are really against the view that one cotenant may recover all, for in the present case the plaintiff claims title to all and is as hostile to his alleged cotenants as to the defendant and does not recognize or represent them in any way. If there is any sound reason in support of the view that one cotenant may recover all, at least under the circumstances of this case, it must be because he has by virtue of the right to his own undivided interest also a right superior to that of a stranger in respect of the undivided interests of his cotenants. But what is his right as to the interests of his cotenants? What is its foundation? What its extent? Is it, when he is not in possession, superior to the right of one who has been in possession long and under color of title? Does it extend to putting such a person as well as a mere intruder or trespasser out altogether? A tenant in common certainly does not hold *per tout*. The interests of tenants in common are several and distinct. One cannot convey or lease any more than his own interest. No doubt one who has a superior right of possession though without a perfect title, as one who has been in peaceable possession for a period and especially if he has color of title, may recover in ejectment from one who has just taken posses-

sion by force without any right. *Kwong Lee Wai v. Ching Shai*, 11 Haw. 444. But to hold that the plaintiff who has never been in possession may recover exclusive possession from one who has long been in under color of title on the ground that he has a superior right of possession as to the two-thirds which by hypothesis do not belong to him is to base the decision on something that is vague and indefinite and seems to savor of begging the question. At any rate the argument in support of the opposite view seems the stronger. It is in part as follows:

A plaintiff in ejectment must recover if at all on the strength of his own case and not on the weakness of the defendant's case. The burden is on him. His recovery should be in accord with his proved right. If he proves title to only an undivided interest and it does not appear who his cotenants are, he of course cannot recover more than his share, because, for aught that appears, the defendant may be the owner of some or all of the rest. But if it appears that the owners of the rest are, or were at one time, persons other than the defendant, must the latter then be put to the task of proving that he has since become the owner or is holding by consent of the owners, that is, must he connect himself with those who are shown once to have been the cotenants, in order to prevent the plaintiff from recovering what does not belong to him? If so, it might involve a lengthy trial of side issues—a trial of rights with which the plaintiff has nothing to do—rights of others, the cotenants, who are not parties. There may be little or no question as to the plaintiff's ownership of a certain undivided interest and he may be able to prove that quickly and easily. But suppose, for instance, the defendant claims title by adverse possession against the cotenants as to the rest. If he is obliged to prove this claim, it may mean a prolonged trial of rights as between him and such cotenants, although the latter are not represented in the case and may even be willing to concede the defendant's claim. To go a step further, suppose the jury finds against the claim and awards all to the plaintiff. The cotenants are not bound

and cannot take advantage of the judgment, for they were not parties. They therefore bring their action, if necessary, against the plaintiff in the first action and obtain a judgment which lets them into possession with him. The defendant in the first action in turn, not being bound as against the cotenants by either of the previous judgments, brings his action against them and obtains a judgment which puts him in and the cotenants out. Thus there are three parties, each with a conclusive judgment in his favor and one against him, who may in turn in perpetual succession get in and be put out, except that the plaintiff in the first action cannot be wholly excluded; that is. A gets in and puts out C, B then gets in with A, C in turn gets in and puts out B, A then puts out C, B again gets in with A then C again gets in and puts out B, and so on *ad infinitum*. Again, if one cotenant is allowed to recover all, the judgment would be conclusive in his favor in a subsequent action by him to recover the whole of the mesne profits although he is properly entitled to only his share of such profits. See particularly the English, Maryland and North Carolina cases, *supra*. Again, the form of the judgment or its mode of execution varies according as the plaintiff recovers a verdict for the whole or for only his part, and this is one of the reasons given (see the English case) for holding that the verdict should be for the plaintiff's part alone, so that the judgment and execution may conform to the truth, and this difficulty is recognized by the North Carolina case also, which seems to hold that the execution should be for only what the plaintiff is entitled to even if the judgment is for all and that the plaintiff if he takes more does so at his own risk, but that this can be settled only by further litigation and not summarily by the judge in directing the mode of execution.

Again, to pass from technical though very practical difficulties to considerations of fairness, and bearing in mind that the interests of tenants in common are distinct, that their rights of possession are several, and that there is no privity between them, entire justice is done one who sues alone if he is given

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his full share. He cannot fairly ask for more. A defendant in possession ought not to be disturbed except by one who has a right to do so, and then only to the extent of that right. The cotenants of the plaintiff may be as willing that the defendant should occupy in respect of their interests as that the plaintiff should. If one cotenant may recover all, each alleged cotenant may sue successively, and thus the defendant stands as many chances to lose all as there are alleged cotenants while the latter stand as many chances to win all, that is, if the defendant loses in any one case he loses all while if the alleged cotenants lose in every case but one and win that, they win all. The chances are uneven. Again, if one cotenant may recover all he might recover what belongs to his cotenants even though they might be estopped from recovering it for themselves. To permit one tenant in common to recover all under the circumstances of this case, might be a wrong to his cotenants as well as to the defendant. For the plaintiff has never recognized that his two alleged cotenants were cotenants, and under the instruction of the court that the verdict could be for only one-third if the other two children were legitimate and therefore cotenants, the verdict in favor of the plaintiff for the entire premises must be construed as a verdict for the title to all, and not merely the possession of all in virtue of a title to one-third. Consequently, if the judgment is allowed to stand and the plaintiff takes possession under it, his possession will be adverse to his cotenants from the start and they will not have the advantage of the rule that one cotenant holds in subserviency to the others and that adverse possession cannot begin in favor of one against the others until notice of it is brought home to the latter. *Smith v. Hamakua Mill*, 13 Haw. 716. Why not require the verdict and judgment to conform to the truth and thus avoid future difficulties, litigation and injustice? At most one tenant in common could not justly ask for more than a title to his share and possession of all as against a stranger, and yet if the verdict in this case should be allowed to stand only on condition that a remittitur should be filed or the judgment so framed or

the pleadings so amended as to show title to one-third only and a right to the possession of the whole as against the defendant it is clear that the plaintiff would elect to go to another trial for the purpose of proving on proper evidence that he was the sole owner. Why let him hold a verdict for the title as well as the possession of the whole and thus enable him to take such advantages as he can from this against his alleged cotenants? Why help him in an attempt to wrong his cotenants, if there are cotenants, as we must assume there are for the purposes of the present contention? Of course, he contends that there are no cotenants, in which case there would be no wrong, but we must assume the contrary for the present.

It has been the general view, and the practice has been in accord with it, in this jurisdiction that a tenant in common may recover only his aliquot part, though that has never been actually decided. The fact that ejectment tries title as well as the right of possession here furnishes an additional reason why this rule should be maintained. In *Kwong Lee Wai v. Ching Shai*, supra, for instance, the plaintiff had title to an undivided half but it was taken for granted though not decided that he could not on the strength of that recover the other half from the defendant who was a mere trespasser, and therefore he was allowed to recover the other half solely on his independent right to that by virtue of having, before the wrongful entry of the defendant, had long peaceable possession under color of title—a right that would have entitled him to the possession of the whole if he had not had title to any part.

EVELYN COOKE ROE *v.* JOHN STRAYER MCGREW.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JULY 2, 1906.

DECIDED JULY 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

TORT—*nonsuit*.

In an action of tort for shooting at plaintiff with a pistol if the evidence on behalf of plaintiff justifies an inference that she suffered damage as a necessary consequence of the tort, a nonsuit should not be granted.

ID.—*exceptions*.

On motion of plaintiff an order of nonsuit, to which no exception was taken, may be set aside at the same term of court.

OPINION OF THE COURT BY WILDER, J.

This is an action in tort claiming damages for an assault. At the close of plaintiff's case defendant moved for a nonsuit, which was granted. No exception was taken by plaintiff to this ruling. Subsequently, and at the same term of court, on motion of plaintiff, the trial court vacated and set aside the order of nonsuit. From this last ruling defendant comes to this court on exceptions, which were allowed by the trial judge in order to speed the determination of the case.

Defendant claims error because (1) no exception was taken to the order granting the motion for nonsuit, and (2) the nonsuit was proper.

The first ground is untenable, because an exception is taken for the purpose of a review by an appellate court and is not necessary for a review by the trial court.

The second ground depends upon whether there was sufficient evidence to go to the jury. The testimony on behalf of the plaintiff showed in substance that on April 12, 1905, while she and her husband were rowing in a boat in Pearl Harbor,

about fifty feet away from defendant's pier, defendant ordered them to go away, swore at them, threatened to shoot them with a pistol which he was flourishing, and finally shot at them, the bullet passing by them; that they then went home, which was a mile or so from the place of the shooting; that plaintiff became sick in body and mind; that Dr. Wood treated plaintiff professionally on April 17, 1905, and a few times after that, stating that plaintiff was suffering from nervousness and morning sickness caused by pregnancy and she also had a pain in her knees.

Defendant claimed that as no actual damage was shown exemplary damages could not be awarded, and also that there was no showing that any damage was the clear and necessary consequence of the tort alleged. The evidence would have properly justified an inference that damage resulted from the assault and consequently it should have been left to the jury. The contention of defendant is practically this, that because the bullet did not hit plaintiff she suffered nothing. With this contention we cannot agree.

The exceptions are overruled.

Castle & Withington for plaintiff.

Thompson & Clemons for defendant.

ELIZA ROY, J. D. PARIS, J. D. JOHNSON, W. H. JOHNSON AND W. H. SHIPMAN, PLAINTIFFS, *v.* M. F. SCOTT, DEFENDANT.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

ARGUED JULY 3, 1906.

DECIDED JULY 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

APPEAL—jurisdiction of district court to try title to land.

A judgment of the circuit court on an appeal from the district court in an action in which title to land was involved is void.

ERROR—practice.

A writ of error lies to revise an erroneous ruling of the circuit court upon the question of jurisdiction although an exception to this ruling had previously been overruled by this court because it was not in such form as then to permit its adjudication.

OPINION OF THE COURT BY HARTWELL, J.

The defendant brings a writ of error to correct numerous errors of law assigned by him in an action of trespass brought against him by the plaintiffs before the district magistrate of North Kona on the Island of Hawaii who gave judgment for the plaintiffs for \$299, from which judgment the defendant appealed to the circuit court, where the case was tried resulting in a verdict for the plaintiffs for the same sum.

Sustaining, as we do, the plaintiffs' contention that the magistrate had no jurisdiction of the trespass which involved a controversy concerning the title in the land trespassed upon, there is no occasion to refer to the other errors assigned.

The third assignment of error is: "That neither the District Court nor the said Circuit Court, and neither of them, had any jurisdiction of said action, since the same involved title to an

estate in realty and the amount involved exceeded the jurisdiction of the District Court in which the action was originally brought."

The amount claimed by the plaintiffs was within the jurisdiction of the magistrate, but as there could be no trespass on land of which the plaintiffs were not actually or constructively in possession and as the defendant denied the plaintiffs' right and claimed to be entitled in his own right to the possession, the magistrate should have declined to try the case, whether the defendant objected to his taking the jurisdiction or not, as soon as he saw that the defendant disputed the plaintiffs' right. The statute provides that district magistrates "shall not have cognizance of real actions nor actions in which the title to real estate shall come in question." Sec. 1662, R. L.

After the trial in the circuit court the defendant brought here a bill of exceptions including an exception to the denial of his motion to dismiss the case "on the ground that the evidence revealed an action involving title to real estate." The exception was not sustained upon the ground that there was nothing to show, as the record now shows, that this defense was made.

We do not sustain the plaintiffs' contention that this question of the magistrate's jurisdiction cannot be raised on error in consequence of the defendant's failure to present it in his bill of exceptions in such form as would permit its adjudication then. The question of jurisdiction was not passed upon and it could not be waived. The circuit court having no jurisdiction its judgment is vacated and the verdict set aside.

Smith & Lewis and *L. J. Warren* for plaintiffs.

J. W. Cathcart for defendant.

ELIZA ROY, J. D. PARIS, J. D. JOHNSON, W. H. JOHNSON AND W. H. SHIPMAN, PLAINTIFFS, *v.* M. F. SCOTT, DEFENDANT.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

ARGUED JULY 3, 1906.

DECIDED JULY 5, 1906.

FREAR, C.J., HARTWELL AND WILDER, JJ.

INJUNCTION AGAINST TRESPASS—*right to.*

A bill for an injunction against trespassing on plaintiffs' land cannot be based on a void adjudication of the title to the land.

OPINION OF THE COURT BY HARTWELL, J.

This is an appeal by the defendant from a decree granting an injunction against his trespassing on the plaintiffs' land, being the same land concerning which the action of trespass was brought before a magistrate, from whose judgment the defendant appealed to the circuit court in which a verdict for the plaintiff was given which has been set aside on error on the ground that the case involved a question concerning the title to real estate and was therefore not within the jurisdiction of the magistrate to try.

The plaintiffs' right to maintain their injunction suit resting upon a void adjudication of their title, which we have reversed, ante p. 598, the bill cannot be sustained. Accordingly, the decree appealed from is reversed, the injunction dissolved and the bill dismissed.

Smith & Lewis and *L. J. Warren* for plaintiffs.

J. W. Cathcart for defendant.

CECIL BROWN v. A. F. JUDD AND E. A. MOTT-SMITH,
PARTNERS UNDER THE NAME OF ATKINSON,
JUDD & MOTT-SMITH.

APPEAL FROM DISTRICT COURT, HONOLULU.

ARGUED JUNE 6, 1906.

DECIDED JULY 9, 1906.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF HARTWELL, J.

ACTION FOR MONEY HAD AND RECEIVED—*by mortgagor's assignee against mortgagee's attorney—no privity necessary.*

An action for money had and received may be maintained by the mortgagor's assignee against the mortgagee's attorney on foreclosure, to recover an excess of fee retained by or paid to the latter out of, and with knowledge on his part that it came out of, the proceeds of the sale. There need be no privity other than what is implied in law between the plaintiff and defendant.

OPINION OF THE COURT BY FREAR, C.J.

The plaintiff was the purchaser on execution sale of a mortgagor's equity of redemption. The defendants were the attorneys for the mortgagee on foreclosure under a power of sale contained in the mortgage, which also provided that the mortgagee might retain from the proceeds of the sale a reasonable attorney's fee. The action is brought to recover, under a count for money had and received an alleged excess retained as an attorney's fee from the proceeds of the foreclosure sale,—on the theory that such excess is a part of the surplus payable to the mortgagor or his assigns. The question is whether the action lies.

It is clear that a mortgagor may maintain an action of this kind against a mortgagee for the surplus, if any, after

payment of the amount secured by the mortgage, the expenses of foreclosure and a reasonable attorney's fee. It is equally clear, and is practically conceded in this court, although the contrary was contended by the defendants in the lower court, that a purchaser of the equity of redemption succeeds to the mortgagor's rights in this respect and may maintain such an action against the mortgagee.

Here the contentions or concessions of the respective parties begin to diverge—the defendants contending that an action cannot be maintained against the mortgagee's attorneys for want of privity or at least some contractual relation between the plaintiff and the attorneys and that the plaintiff can look to the mortgagee alone, the plaintiff contending that no privity or contractual relation is necessary. The latter view is undoubtedly correct. For instance, if the attorneys had collected the proceeds of the sale and still had them in their possession without having accounted with their principal, the mortgagee, there could be no question but that the action could be maintained against the attorneys on the familiar rule that money may be recovered by its owner from an agent or sub-agent before the latter has paid it over to his immediate principal. This is only an application of the general principle upon which an action for money had and received is founded, which is that it is an action of an equitable nature by which any one to whom money belongs may recover it from any other who has it and cannot conscientiously retain it or ought in equity and good conscience to refund it. As stated in a passage often quoted from *Hall v. Marston*, 17 Mass. 579, "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise." That is to say, there need be no privity or promise in fact, either express or implied. The privity or promise, so far as there is any in theory, may be one created solely by law from the cir-

cumstance that one has the money of another without right to retain it, or, to put it another way, the privity or promise is a mere fiction for the purpose of enabling the owner to enforce the right under the form of an action upon contract. The obligation, when there is no privity, is sometimes called a quasi-contract but strictly speaking is not a contract at all, for it may arise not only without the assent of the person obligated but even against his express repudiation of any obligation. Keener, *Quasi-contracts*, 4-8; 2 Page, *Contracts*, Secs. 789-791.

This view, that no privity is necessary, was held recently by this court, after careful consideration, in the *Estate of Scrimgeour*, ante, p. 122, in which several cases are cited upon which the plaintiff relies in the present case. In that case an administrator obtained under claim of right from an insurance company the amount of certain policies of insurance upon the life of the deceased, but it was held that the beneficiaries, the "legal heirs," named in the policies, might maintain an action against the administrator for the amount so obtained, although they might have ignored the administrator in the matter and sued the insurance company itself—for its payment to the wrong party would not protect it,—and although they knew nothing about the policies until long after the administrator had collected the money.

The following cases bear much similarity to the present case. In *Wallace v. Shelley*, 30 Fed. 747, the sheriff employed an auctioneer to sell property on execution. The auctioneer made the sale and turned over the proceeds less his commissions. It was held that the sheriff had no right to employ the auctioneer at the expense of the owner of the property and consequently that the auctioneer had no right under his agreement with the sheriff to retain commissions out of money that really belonged to the owner and that he could be held in an action by the owner for money had and received to the extent of the moneys so retained by him. In *Brand v. Williams*, 29 Minn. 338, the sheriff, after selling property for enough to satisfy four executions and paying the amount of the first execution, paid the

balance over to the defendant without first paying the amount of the other three executions, and it was held that the owner of the claim on the fourth execution could recover from the defendant the amount of his claim. In *Soderberg v. Kings County*, 15 Wash. 194, the sheriff sold property under various foreclosure proceedings and without right retained certain commissions which he believed he was by law entitled and required to retain and paid them into the county treasury according to law as he believed. It was held that the assignee of the judgment debtors could recover from the county the amount so retained and paid, as a part of the surplus on the foreclosure sales. See also cases cited in the *Soderberg* case.

The case of *Atwell v. Jenkins*, 163 Mass. 362, relied on by the court below and by the defendants, throws little light upon the present case except by way of contrast. In that case B, under arrest, retained C as his attorney and telegraphed A to send C \$400, which A did. Afterwards A sued C for the money on the theory that B was insane and therefore not bound and consequently that he, A, was not bound, and that therefore the money still belonged to him, A, but the court held that the contract was only voidable as to B, if he was insane, and that A was absolutely bound. Consequently the transaction amounted merely to a loan from A to B. C got the money through an arrangement with B with which A had nothing to do. It was held that A could not recover from C either on the theory of a contract with him, for there was none, or on the theory that it was his, A's money, which he could pursue into C's hands, as distinguished from a mere debt owing to him from B.

It does not follow, however, that the action lies, because no privity is necessary. It may not lie despite that. An action of this kind does not enlarge substantive rights. 2 Page, Contracts, Sec. 793. It remains to be seen whether the money was equitably the plaintiff's and not a mere debt owing to him. whether the defendants received it, and whether they can conscientiously retain it.

The court below gave judgment for the defendants upon motion at the close of the plaintiff's case as matter of law upon the sole ground of want of privity. It being now held that no privity was necessary, the question is whether the plaintiff made out a prima facie case on the evidence. The surplus, if any, of course belonged equitably to the plaintiff; and whatever was not required to pay the mortgage debt, the foreclosure expenses and a reasonable attorney's fee, was surplus. The amount retained as a fee was \$150, which, the plaintiff contends and the evidence tends to show and we must assume for the purposes of this appeal, was excessive to the amount of \$75. As to this excess the question is the same on principle as it would be if, as in several of the cases above cited, no fee at all had been retainable out of the proceeds. Are the defendants entitled to retain this out of the plaintiff's money? We will assume that they are holders for value under their arrangement with the mortgagee so far as the latter is concerned. But are they holders without notice of the plaintiff's rights? The evidence tends to show that they received the entire proceeds of the foreclosure sale. It perhaps on the other hand would justify an inference that they made some accounting with the mortgagee. If they merely retained their fee and paid the balance over, they of course had full knowledge that the entire fee came out of the proceeds, and are liable for any excess. But if they paid over the entire proceeds to the mortgagee and then were paid back their fee out of other money, or perhaps even out of the same money without knowing or having reason to know that it was the same money, they would not be liable. Their position in such case would be much the same as it would be if they had been paid in advance before receiving and paying over the proceeds, or as it would be if the proceeds had been paid directly to the mortgagee and the attorneys had received their fee without knowledge of its source, or as it would be if, as in *Mowatt v. McLelan*, 1 Wend. 174, the attorneys had collected a sum of money for their client and themselves had retained their fee, which in that case was found to be reasonable in

amount, out of it without notice that the party from whom it was collected still had any rights in it or was entitled to recover it back as paid under a mistake, and especially if, as in that case, before the attorneys were sued their position had changed as by the running of the statute of limitations against a suit over by them against their client—for in order to maintain an action of this kind, founded, as it is, on justice and equity, the defendant, if innocent, should be placed in statu quo. 2 Page, Contracts, Sec. 792. Of course, a settlement merely by entries in the attorneys' books on an open account would not be sufficient to relieve them of liability. 1 Clark & S., Agency, Sec. 447; Story, Agency, Sec. 300. We will assume that they turned over the entire proceeds to the mortgagee; still it appears that they themselves made out a statement of account for the plaintiff, though in the name of the mortgagee, showing that their fee came out of the proceeds of the sale and therefore that they knew that fact. In short, they were not holders of the plaintiff's money without notice and therefore could not conscientiously retain his money and are liable—unless the defendants can show the facts to be different.

Ordinarily we should expect the action to be brought against the principal rather than against the agent as that would be simpler and more just in most cases, and if the present action had been brought against the mortgagee there would have been no difficulty. Of course, if the mortgagee were insolvent the reason and justice of bringing the action against the agent or attorney, who had received the plaintiff's money, would be apparent, and yet the mere fact that the mortgagee is solvent would not prevent the action from being brought against the attorneys, if it could otherwise be brought against them. In several of the cases above cited there was no question of solvency or insolvency and yet to the argument that the action should have been brought against the principal, the court replied in substance that it was for the plaintiff to say against which of the two parties he should bring it, each being liable under the law. In the present case, as already shown, the attorneys

• knew that the surplus belonged to the plaintiff and yet received or retained the excess, if any, of their fee out of that surplus. The difference between taking with notice and taking without notice of the fact that the money belonged to another than the attorneys' client is illustrated by numerous cases, among which are several of those above cited. Only one other case will be cited by way of further illustration, that of *Bank of the Metropolis v. First National Bank*, 19 Fed. 301. In that case bank A sent to bank B certain checks for collection endorsing them "for collection." Bank B sent them for collection to bank C pursuant to an arrangement between them by which each sent to the other commercial paper for collection on the understanding that the proceeds were not to be returned specifically but were to be credited by the receiving bank to the sending bank and applied by way of setoff to any indebtedness of the sending bank to the receiving bank. Bank B became insolvent and bank A sued bank C. The court held that under the arrangement the relation of bank C to bank B was that of debtor and creditor and not merely of agent and principal, and that bank C was a holder for value; that is, as in *Mowatt v. McLelan*, supra, if the defendants had not known that the checks were the property of the plaintiff it would not have been liable in an action by the plaintiff, but that since the checks were endorsed for collection it had notice that they were not the property of bank B and so was liable to bank A notwithstanding that it had settled so far as those checks were concerned with bank B, and might have settled so as to escape liability by going through the ceremony of transmitting the money to bank B and having the same amount returned whether it was the same or different money so long as the defendant did not know the money belonged to another than bank B.

Accordingly we must hold that a *prima facie* case was made out against the attorneys. It remains for the district magistrate to decide, after hearing the evidence of the defendants, if they have any to offer, whether the fee retained or received by them was excessive, and, if so, whether the defendants may retain the

excess by showing that they received it without notice of the plaintiff's rights or for any other sufficient reason.

The judgment appealed from is reversed and the case remanded to the district court for further proceedings.

C. F. Clemons (*Thompson & Clemons* on the brief) for the plaintiff.

Defendants in person.

TERRITORY OF HAWAII, BY C. S. HOLLOWAY,
SUPERINTENDENT OF PUBLIC WORKS, *v.* E. J.
COTTON, C. E. COTTON AND JAMES B. AGASSIZ,
PARTNERS UNDER THE NAME OF COTTON
BROS. & CO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 9, 1906.

DECIDED JULY 10, 1906.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF HARTWELL, J.

EXCEPTION TO VERDICT—*statement as to time when taken.*

A statement in a bill of exceptions that an exception to the verdict was taken at the time of its rendition is sufficient to show that it was taken in the presence of the jury and before its discharge.

EXCEPTIONS—*should be incorporated in bill.*

A statement in a bill of exceptions to the effect that various exceptions were taken during the trial as will appear by the transcript, when made, of the stenographer's notes, is insufficient. The exceptions should be set forth in the bill itself.

BILL OF EXCEPTIONS—*amendment of.*

A bill of exceptions cannot be amended by inserting additional exceptions in it after the time prescribed by statute for the incorporation of exceptions in a bill and the presentation thereof to the judge.

OPINION OF THE COURT BY FREAR, C.J.

The defendants moved for a new trial in the circuit court and, for the purpose of saving their rights as they contend, filed also a short bill of exceptions referring for most of the exceptions to the transcript of the stenographer's notes, which had not then been prepared, and obtained an extension of time until ten days after filing the transcript in which to file a further bill of exceptions specifying all exceptions shown by the transcript to have been taken and allowed. The motion for a new trial, however, was granted, several terms afterward, and therefore the defendants, thinking that they would not need the bill of exceptions, did nothing further in regard to it until recently when the order granting a new trial was reversed by this court on error brought by the plaintiff. See decisions ante, pp. 374, 445. They then moved the lower court, at the sixth term and nearly two years after the bill was filed, for leave to amend the bill of exceptions, which motion was granted and the bill, as amended extensively, was allowed. The plaintiff now moves in this court to dismiss the bill so allowed on eight grounds, which it condenses in its brief into three, each of which will be considered.

1. "That the original bill of exceptions was not presented to the trial judge within the time prescribed by law." The time prescribed is twenty days after final judgment or such further time as may be allowed. R. L., Sec. 1864. The verdict was rendered May 27, 1904, judgment was entered June 7, 1904, the bill was filed June 8, 1904, and the evidence, particularly the testimony and affidavits of the trial judge and the defendants' attorney, show clearly that it was presented to the judge by the attorney probably on that date but at any rate before June 15, and therefore within the prescribed time.

2. "That neither by incorporation nor reference are the record, pleadings, exhibits, transcript or judgment made a part of the original bill of exceptions." The bill states that "the pleadings, exhibits and transcript of the record are hereby

referred to and made part of this bill of exceptions." If the words "transcript of the record" in this statement may be construed "transcript of the evidence," as we think it properly may be, the statement is sufficient, at least in so far as the exception to the verdict is concerned, which alone need be considered, as will presently appear. If the statement were not sufficient it perhaps would be amendable so as to be made sufficient, as it is in the amended bill now before us, under the decisions in *Magoon v. Ahmi*, 11 Haw. 233, and *Kapiolani Estate v. Thurston*, 16 Haw. 147. No question is raised by the plaintiff as to whether the transcript, not being actually attached to the bill, is sufficiently identified. See *Aylett v. Keaweamahi*, 8 Haw. 320.

3. "That the original bill of exceptions does not contain any legal, valid or proper exception." The exceptions, as set forth in the bill, are divided into two classes, namely, the exception to the verdict, which is covered by one statement, and all other exceptions, which are covered by another statement. The statement in regard to the exception to the verdict is substantially the same in the original bill and the amended bill and reads as follows: "At the time of the rendition of said verdict, to wit, May 26 [27], A. D. 1904, the defendants excepted to the verdict as contrary to law and the evidence." The objection now made to this is that it does not appear from the bill that this exception was taken, as is claimed to be required by practice or rule of court, in the presence of the jury and before the jury was discharged. In our opinion this does appear from the statement in the bill that the exception was taken at the time of the rendition of the verdict.

The statement in the bill in regard to the other exceptions is as follows: "During the trial of the cause certain exceptions were taken by the defendants to rulings of the court upon evidence, and also to the giving of certain instructions at the plaintiff's request, as well as to the refusal to give certain instructions requested by the defendants, or to giving the same in a modified form; all of which said exceptions were duly taken and allowed

and appear on the transcript of the record made from the stenographer's notes at the trial." This when condensed is simply a statement that during the trial certain exceptions were taken and allowed, as will appear by the transcript, when made, of the stenographer's notes, and, as repeatedly held, does not amount to a statement or incorporation of the exceptions in the bill. See *Arruda v. Morton*, ante, p. 126, and cases there cited. A bill cannot be amended by incorporating therein new exceptions after the time prescribed by statute even though it may be amended so as to make exceptions already incorporated therein available. *Kapiolani Estate v. Thurston*, supra. The time allowed by the statute above cited for incorporating exceptions in the bill, as well as for presentation of the bill to the trial judge, is twenty days after final judgment or such further time as may be allowed. In this case, as already shown, further time was allowed until ten days after the filing of the transcript, but no attempt to amend was made within that time. Afterwards time for filing a bill was extended by the judge in pursuance of a stipulation of the parties until ten days after the decision of the court on the motion for a new trial. That time also elapsed without any attempt to amend the bill. It is true, as contended by the defendants, that the motion to amend the bill was made within ten days after this court's reversal of the order for a new trial, but, as we construe the stipulation and order for the extension of time within which to file a bill of exceptions, they referred to the decision of the trial court upon the motion for a new trial and not to the decision of this court reversing that decision. We hold, therefore, that the bill was not amendable, at the time an attempt was made to amend it, so as to have incorporated in it the exceptions other than that taken to the verdict.

The result is that the exceptions other than that to the verdict cannot be considered, but that, since the exception to the verdict can be considered, the motion to dismiss the bill must be denied, and it is so ordered.

E. C. Peters, Attorney General, for plaintiff.

S. H. Derby (Kinney, McClanahan & Derby on the brief)
for defendants.

IN THE MATTER OF THE APPLICATION OF RICH-
ARD H. TRENT, TREASURER OF THE COUNTY
OF OAHU, FOR A WRIT OF MANDAMUS
AGAINST J. H. FISHER, AUDITOR OF THE TER-
RITORY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JULY 18, 1906.

DECIDED JULY 18, 1906.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE ROBINSON IN
PLACE OF HARTWELL, J.

COUNTY REVENUES—*taxes delinquent before but collected after county government.*

Under Act 93 of the Laws of 1905, counties are entitled to be paid for the six months following the establishment of county government on July 1, 1905, fifty per centum of all poll and school taxes and taxes on property and incomes collected by the Territory during that period, including the portion that became due and delinquent prior thereto.

STATUTORY CONSTRUCTION—*testimony of legislators inadmissible.*

The testimony of members of the legislature which enacted a statute is inadmissible for the purpose of determining the construction of the statute.

OPINION OF THE COURT BY FREAR, C.J.

This is an application by the treasurer of the county of Oahu for a writ of mandamus to compel the auditor of the Territory to issue to him a warrant for fifty per centum of the amount of poll and school taxes and taxes on property and incomes

which were collected by the Territory within the county of Oahu during the latter half of the year 1905 but which became delinquent prior thereto, and for which the county treasurer contends a warrant should have been issued within the first fifteen days of January, 1905, under subdivision 1 of section 1 of Act 93 of the Laws of 1905. The amount in question is \$17,639.38. The circuit judge granted a peremptory writ and the Territory appeals. The question is whether the act referred to applies to taxes which became delinquent prior to the establishment of county government on July 1, 1905, but which were collected afterwards.

The act, which is entitled "An Act Relating to Funds for the Payment of Expenses of the Several Counties," begins with a provision that, "Fifty per centum of the total amount of poll and school taxes and taxes on property and incomes, collected in each county, shall be paid by the treasurer of the Territory of Hawaii to the treasurer of such county in the following manner." It is clear, and indeed is conceded, that this provision if not controlled by other provisions would cover all taxes of the classes named collected during the period in question whether delinquent before that or not. The words are "the total amount * * * collected" without any qualification whatever as to when it was assessed or when it became payable or delinquent. But it is contended that this provision is qualified by subsequent provisions in the act, and particularly by the next paragraph, which is subdivision 1 of section 1, and which is expressly referred to in the provision already quoted and made a part of it by the words "in the following manner:" It may be stated, however, in passing, that the words "in the following manner" relate solely to the method of payment and do not purport to control the "amount collected" or the classes of taxes or amount payable to the several counties. Subdivision 1, referred to, reads as follows:

"1. The Auditor of the Territory shall on the last legal day of each and every month issue a monthly warrant on the Treasurer of the Territory in favor of each County Treasurer,

such monthly Warrants for the half year from July to December 1905 inclusive, shall be in an amount not less than ten per cent, and thereafter in an amount not less than fifteen per cent, of the estimated Tax payable to each County within every half year, and within the first fifteen days of January and July in each year, the said Auditor of the Territory shall issue a Warrant on the Treasurer of the Territory in favor of each County Treasurer for an amount equal to the balance in favor of each County less the amount of the Warrants issued and interest paid for such Warrants, during the last preceding six months."

The argument is that in estimating the "taxes payable to each county within every half year" the auditor could take into account only the amount assessed to become payable or delinquent during the half year in question and not the amount payable during that period but which had become payable and delinquent prior thereto, especially as the latter amount from its very nature and from the fact that it might include amounts that had become delinquent for a number of years past could not be estimated with any degree of accuracy. To this it might be replied, although it might not be conclusive, that there could not be an accurate estimate in any event, since there would be during each period a greater or less number of delinquencies in the payment of taxes to become payable during that period. and that the estimate might be far from accurate in any event was contemplated by the legislature, for it provided for the payment of only ten and fifteen per centum respectively per month of the estimated amount in each half year, thus leaving considerable leeway for errors in the estimates, the balance, if any, to be paid after the expiration of the period of six months. Moreover, as practically already stated, this provision relates merely to the manner of payment, and even if the auditor were to estimate merely the amount to become payable during the period in question, without reference to delinquencies occurring in that period or payments of prior delinquencies. this would not necessarily show that the counties were not to share in the amounts collected on prior delinquencies. But

what perhaps is a conclusive answer to the argument is that, if it is sound at all, it applies as well to subsequent periods of six months as it does to the first period after the establishment of county government. There is nothing whatever, either in the language of this subdivision or in the supposed practical difficulties that the auditor might experience in making his estimates, upon which a distinction can be founded between delinquencies occurring before the first period and delinquencies occurring after that period but before any subsequent period; and yet it is clear, and also conceded, that it could not have been contemplated or intended that the counties should not share in the taxes which became delinquent in one period but which were collected in a subsequent period of county government. If, for instance, this subdivision showed that taxes delinquent prior to July 1, 1905, but afterwards collected, were not to be shared by the Territory with the counties, it shows equally that the counties would not be entitled to any of the taxes which became delinquent during the latter half of 1905 or the first half of 1906 but which were collected during the latter half of 1906,—which would be absurd.

It is contended further that section 4 also supports the contention of the Territory. It provides, "That out of the taxes payable after July 1, 1905, for the year 1905, the Treasurer of the Territory is hereby authorized to reserve out of the share of each of the several counties for the benefit of the Territory the following sums," naming them. The object of this was, of course, to enable the Territory to pay liabilities incurred before county government, that is, during the first half of 1905, out of the taxes collectable during the last half of that year, inasmuch as at that time the bulk of the taxes assessed during the first half of the year were collectable during the last half of the year, while now collections have been more evenly divided between the two halves of the year. It is argued that this section shows that the counties were intended to share only such taxes as were payable for the particular year that might be in question or that at least that was the intention as to the

year 1905. No doubt the section does point in that direction, and yet it is not sufficient to control the clear, unambiguous language of section 1, and is not inconsistent with it. It provides merely for the payment of certain sums out of a particular fund. On the other hand, it points, though perhaps not to the same extent, also in the opposite direction, for it tends to show that the legislature had in mind the distinction between taxes assessable and taxes collected during a particular year and enacted this section with that in view, and yet it did not make any such distinction in section 1. The fact probably is that in enacting section 1 the point now in dispute did not occur to the legislature. The question is what does the language that was used mean. For these reasons, so far as the language of the act is concerned, the contention of the Territory cannot be sustained.

It is, however, contended that the legislature must have so intended on general principles on the theory that as a business arrangement the Territory would naturally collect all amounts owing to it prior to the establishment of county government and that it and the county would naturally share amounts to become due thereafter. But a general consideration of this kind cannot control the plain language of the act. No part of the taxes were to belong inherently after the establishment of county government to the several counties nor was the Territory to retain the portion that it did on the theory that that belonged inherently to it. The whole belonged to the Territory and was thereafter to be divided in the way the legislature thought best between the Territory and the counties, which were thereafter to share the duties and expenses which previously had been borne by the Territory alone. No provision was made for the assessment, levy or collection of taxes by the counties. The whole arrangement was of an artificial nature by which the Territory was to pay the counties certain amounts with which to meet their expenses. In the long run it might not make much difference which way the provision was made. The amount of delinquent taxes collected during each period would

probably be about the same percentage of the whole. If the counties received in the first period an amount that had become delinquent prior thereto the Territory might likewise acquire after a change in the system, if a change should be made, a like amount that had become delinquent during the period of county government. The legislature may have figured on the average amounts collected in the past without analyzing them with reference to the periods for which their various parts were assessed. The act throughout shows the artificial character of the division as one based mainly on considerations of what the Territory and the several counties respectively required, excepting that the amount to be divided between the Territory and each county should have been collected in that particular county. An equal division was made of certain classes of taxes, but the Territory was to receive the whole of certain other classes. The counties, on the other hand, were, as provided in section 3, to receive the entire road taxes whether they had become delinquent before the establishment of county government or not and even though they had already been collected by the Territory but not paid out. The county was to receive fifty per centum of the school taxes, which would naturally be expected to be levied for school purposes, and yet the counties were to have nothing to do with the schools.

It is contended also that the act should not be construed retroactively. There is no constitutional provision against retroactive legislation as such, and if there were it would not prevent a provision of this kind. *Peacock v. Republic*, 11 Haw. 409. And, as a question of construction as distinguished from one of power, the provision in question when construed as contended for by the county is not obnoxious to the rule against retroactive legislation. It provides merely for a division which it was entirely competent for the legislature to make; and, though this is unimportant, the division was to be in the future and, so far as the taxes in question are concerned, the counties were to share only what was to be collected in the future. The legislature might reasonably have provided either way. It provided one way though perhaps unconsciously as to which way.

The offer to show the actual intention of the legislature by the testimony of several of its members was properly refused.

The judgment appealed from is affirmed.

E. A. Douthitt, County Attorney of Oahu, D. H. Case, County Attorney of Maui, and J. L. Coke for the petitioner.

M. F. Prosser, Deputy Attorney General, for respondent.

TERRITORY OF HAWAII, BY C. S. HOLLOWAY,
SUPERINTENDENT OF PUBLIC WORKS, *v.* C. E.
COTTON, E. J. COTTON AND JAMES B. AGASSIZ,
PARTNERS UNDER THE NAME OF COTTON
BROTHERS & COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JULY 30, 1906. DECIDED SEPTEMBER 27, 1906.

FREAR, C. J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF HARTWELL, J.

VERDICT—*held supported by evidence.*

A verdict for \$25,000 for the loss of a dredger through the alleged negligence of the defendants, who hired her from the plaintiff in the harbor of Honolulu and after using her there took her to the bar at the entrance to Pearl Harbor, where she was lost, is held supported by the evidence.

TRIAL JUDGE'S OPINION—*that verdict is contrary to evidence, what weight to be given to.*

An opinion expressed by the trial judge that the verdict is against the evidence—in this case on the question of negligence—is not conclusive. In this instance it was expressed in a ruling that was set aside as beyond his jurisdiction, but, assuming that some weight might nevertheless properly be given to it, it cannot control in view of the inadequacy of the reasons given for it by the trial judge and the clear adequacy of the evidence to support the verdict.

ESTOPPEL—*none by consent upon condition when condition not performed.*

Consent, if given, by the plaintiff to the defendants to take the dredger to Pearl Harbor upon condition that the latter should give an adequate bond for her safety, which condition was not performed, would not estop the former from recovering damages for the latter's negligence in taking her there, if that were negligence.

ID.—*none by mere knowledge and silence, when.*

The plaintiff would not be estopped by the mere knowledge of its assistant superintendent of public works that the defendants were to take or had taken the dredger to Pearl Harbor, if that were negligence, and his failure to object—it not appearing what authority he had in the matter or what knowledge he had as to the rights of the defendants, and the latter, who had dealt with the superintendent of public works, having full knowledge of the extent of their rights.

ID.—*none by consent to use without specifying place of use, when.*

Consent, by contract, to the use of a dredger for a specified time without specifying the place of use, does not necessarily permit its use in any place however remote or dangerous.

ID.—*consent to do a thing is not consent to do it negligently.*

Consent, if given, to take the dredger to Pearl Harbor and use her there would not estop the plaintiff from recovering damages for the defendants' negligence, if any, in placing or keeping her there under dangerous conditions.

NEGLECT—*preponderance of evidence, proximate cause, failure to provide against contingencies.*

Evidence tending to show that the defendants kept the dredger without proper protection where she was liable to be swamped in rough weather and that she was swamped in such weather, is sufficient to support a verdict that she was lost through the negligence of the defendants, even if there was no evidence of any special negligence during the last two hours before she sank and even if it was not negligence to place and use the dredger there in calm weather and there was no available means of taking her to a place of safety after rough weather arose, the defendants having failed to provide such means.

HYPOTHETICAL QUESTION—*form of.*

A nautical expert may properly be asked whether it would be "safe or prudent" to moor a dredger as described. It is not necessary to ask instead whether such mooring would be such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances.

VALUE—*evidence of, at time of loss.*

Evidence that the value of the dredger was \$45,000 only eight months before she was lost and that during that time she had been used only in a quiet harbor and that she was then considered in sufficiently good order to be taken without further repairs for extensive use on a rough bar, would be sufficient to support a finding that she was worth \$25,000 at the time she was lost—but there was direct evidence tending to show that she was worth that then.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for \$25,000 for the loss of a dredger through the negligence of the defendants. The plaintiff obtained a verdict for the amount claimed and the defendants bring exceptions to this court. The principal exception is that taken to the verdict as contrary to the law and the evidence, and this is the only one that can be considered. See decision on motion to dismiss the bill of exceptions, ante, p. 608.

The theory of the plaintiff is that the dredger was swamped in consequence of being put or left in a dangerous position through the negligence of the defendants. The defendants contend that no negligence on their part was shown, that if there was any negligence the plaintiff is estopped by its consent or acquiescence from setting it up, and that the evidence does not show so great a loss as \$25,000.

The dredger consisted of a rectangular flat-bottom scow 40 x 100 feet with a ladder extending in front 75 feet, and with the necessary machinery. She drew 6 or 7 feet of water. Her machinery was covered by a house made of 1 x 7 inch tongue and groove built 9 feet high on a coping six inches thick by sixteen inches high on the deck. The house had a pair of sliding doors 12 feet wide at the stern, and smaller sliding doors on the sides. It covered most of the deck, leaving spaces outside of it on the deck about 4 feet wide at the sides, six feet at the stern, eight feet at the bow to the ladder and fourteen feet on the sides of the ladder. The dredger was without means of self-propulsion.

By a contract made January 10, 1902, the plaintiff allowed the defendants the use of the dredger and appurtenances for one year upon their agreement to make complete repairs to the same in a sum of not less than \$10,000, insure them for not less than \$20,000 against loss or damage by fire and give a bond for \$10,000 for their return in good working order. The repairs were made soon afterwards and from March to October the defendants used the dredger in the harbor of Honolulu. In July or August there was some talk, referred to more fully below, between Mr. Boyd, then superintendent of public works, who acted for the Territory in the matter, and the defendant Agassiz, who acted for the defendants, in regard to taking the dredger to the entrance of Pearl Harbor for use there before the expiration of the contract and also in regard to making another contract for continuing the use of the dredger there after the expiration of the contract already made. The defendants contemplated taking over from third parties a partially executed contract for dredging the bar at the entrance to Pearl Harbor. In September they took over that contract and on October 30 had the dredger towed from Honolulu harbor to a point off the entrance to Pearl Harbor by the tug Fearless, and there, because the Fearless was too deep to cross the bar, delivered to the tug Kaena, which took her to a position about 900 feet from the outer edge of the bar and 1000 feet from the inner edge and about two miles from land, where she was moored with her bow pointing seaward in about fifteen feet of water (one witness says 25 feet) by seven wire cables from 150 to 200 feet in length, which were made fast, some to dolphins consisting each of four posts 12 x 12 and some to anchors. The day on which she was taken to Pearl Harbor was specially calm—perhaps selected on that account for the purpose, as one witness seemed to think. Early on the morning of the 19th day thereafter she sank. During that period she was unable to do any work, apparently because, as one witness testified, the water, though not particularly rough until the last three days,

was too rough to take out from Pearl Harbor the pontoons, which were about 8 x 24 feet in size, and connect them and moor them in position. Eleven or twelve days before the dredger sank one of the scows 40 x 80 feet in size broke loose and went ashore. On the Saturday before the Tuesday on which the dredger sank there was a strong wind, said to amount to half a gale, from the ocean and a heavy swell, estimated at from six to twelve feet in height. On Sunday it was rougher. That evening one of the cables parted but was spliced together the next day. On Monday it was rougher still and towards noon a post in one of the dolphins and two cables broke allowing the dredger to swing around 150 to 200 feet with her bow towards the leeward side of the channel and her stern out square against the waves. Two six-inch Manila cables were then brought from shore to replace the broken wire cables. On Tuesday morning between 2 and 2:30 o'clock the dredger sank in about 15 feet of water,—one witness says sixteen at low tide by measurement. She may have drifted or been washed, before or after she sank, several hundred yards from where she was moored last. Other facts will be stated as we proceed.

The defendants contend that much weight should be given to the opinion expressed by the trial judge that the verdict was contrary to the evidence on the question of negligence, notwithstanding that his order granting a new trial upon that ground was set aside by this court as made without jurisdiction. See decisions ante, pp. 374, 445. The question being whether this court should set aside the verdict and grant a new trial, it is not precisely the same as it would be if it were whether this court should set aside an order for a new trial made by a trial judge within his jurisdiction. But, assuming that some weight might well be given to an opinion expressed by a trial judge even under such circumstances, such opinion, of course, would not be all-controlling, and in the present instance the reasoning of the trial judge, which is set forth at length, is so clearly insufficient to support his conclusions and the evidence is so

clearly of a nature to be passed on by the jury, that the verdict must be sustained.

The defenses, although not thus stated by the defendants, are substantially (1) that the plaintiff is estopped, by its consent to or acquiescence in the defendants' taking the dredger to Pearl Harbor; from setting up negligence on their part, and (2) that there was no negligence on their part, or at least that, if there was any, it was not the proximate cause of the loss.

In support of the defense of estoppel it is contended in the first place that the then superintendent of public works, Mr. Boyd, gave the defendants, through Mr. Agassiz, permission to take the dredger to Pearl Harbor. The only testimony upon this point is that of Mr. Boyd on one side and Mr. Agassiz on the other. Mr. Boyd in answer to the question, "Can you state whether or not permission was ever granted by you for them to take the dredger to Pearl Harbor," replied, "Not to my recollection." Mr. Agassiz testified, "My recollection is that he did give me permission to take the dredger to Pearl Harbor." It was for the jury to say whose recollection was the better. The remaining testimony of these witnesses upon this point tends to show, in large part at least, that Mr. Boyd, when requested by Mr. Agassiz for permission to take the dredger to Pearl Harbor, declined to make any agreement at that time although he expressed a willingness to enter into an agreement on certain terms at a future time. The plaintiff contends, and with much support from Mr. Boyd's testimony, that Mr. Boyd told Mr. Agassiz that he would not enter into any agreement until the defendants had taken over the contract for dredging Pearl Harbor bar, which would be after his return from the mainland, for which he was about to depart, and that then he would permit the dredger to be taken to Pearl Harbor only on condition that further security in the form of a bond should be given for her safety, and that he would agree to allow the use of the dredger to be continued there after the expiration of the contract already made for a rental of not to exceed \$1000 a month. The defendants contend that permission was given to take the

dredger to Pearl Harbor immediately without any further bond being given, and that the talk in regard to a further bond related solely to the contemplated use of the dredger under the proposed new contract after the expiration of the contract already made, and in support of this view they rely particularly on the clauses which we italicize in the following passage from Mr. Boyd's testimony: "The reason rental was talked of at the time, I proposed the rental to them AS IT WAS BEING TAKEN OUT OF THE HARBOR OF HONOLULU, TAKEN DOWN TO WORK IN PEARL HARBOR, on which they called my attention to the contract, they had an unexpired term, between three and four months, *and under that contract on an unexpired term they had a right to the use of the dredger*, so in the conversation that IF THEY GAVE THE GOVERNMENT A GUARANTEE OF THE RETURN OF THE DREDGER, *just as in the former contract*, that the PERMISSION MAY BE GIVEN BY THE GOVERNMENT TO THEM TO TAKE THE DREDGER DOWN THERE, AND after the expiration of their term they were to pay a rental, I think it was \$1000 a month." This passage is from the defendants' standpoint at best ambiguous, especially in view of the parts that we capitalize. Taking Mr. Boyd's testimony as a whole there is much to sustain the theory that he required an additional bond to be given upon taking the dredger to Pearl Harbor and for the reason that it was to be taken there, whether he thought it was to be taken there before or after the expiration of the contract already made. For instance, immediately after the passage just quoted Mr. Boyd testified: "After the expiration of the contract I was agreeable to it," that is, the rental of the dredger, "and also that upon being—the contract," that is, to dredge the Pearl Harbor bar, "being transferred to the Cotton Brothers, that the final agreement would be entered into with the government, in order to protect the government's property, that is, protect the dredger on its being taken out of the harbor to Pearl Harbor." A little earlier in his testimony he had said: Mr. Agassiz "asked me if I had any objection to the dredger being taken down there. I said I had no objection provided a proper safeguard was made for protecting the government's property."

The jury might well have found not only that no permission was given to take the dredger to Pearl Harbor, but also that the permission to be given at a future time was to be upon a condition as to the giving of a further bond, which was never complied with.

The defendants and the circuit judge seem to mistake a contemplated final agreement for a mere formal execution of a final agreement already made. Worse, they contend that even if the superintendent said that he would permit the dredger to be taken to Pearl Harbor only on condition that a further bond should be given for its safety, and even if that condition was not fulfilled, the plaintiff would be estopped from saying that using the dredger there was negligence, and they argue that it would not be any more negligent to use it there before permission was given to do so than it would be after that. They seem to confuse to some extent the idea of an estoppel on the part of the plaintiff from setting up negligence on the part of the defendants with the idea of absence of negligence as a matter of fact. If the plaintiff was willing that the defendants should use the dredger in a dangerous place or under dangerous conditions, provided the latter would assume the risk and provide for full compensation to the former in case of loss, the inference would be that the plaintiff considered that it would be negligent to use the dredger there rather than that it would not be negligent to do so, and such an agreement would not make that prudent on the part of the defendants which would otherwise be negligent in fact. Nor would willingness to make such an agreement work an estoppel. Otherwise, no one could set up as negligent anything whatever done to his property if he would be willing to have that done upon his being fully compensated or secured—which would be absurd. If in such case the consent of the plaintiff would estop it from bringing an action on the case if the dredger were lost and confine it to its right of action on the contract or the bond, it is still beyond dispute that a proposed agreement or conditional consent of that kind would not estop it from bringing its action on the case if the

defendants took the dredger and used it there without the agreement being made or without the performance of the condition imposed. Consent so conditioned would not be operative until performance of the condition.

The defendants contend next in support of the defense of estoppel that the plaintiff, through its superintendent, Mr. Boyd, or assistant superintendent, Mr. Campbell, had knowledge that the defendants took or were to take the dredger to Pearl Harbor and that that is sufficient to constitute an estoppel, or, as they and the circuit judge seem to think, is sufficient to take the character of negligence from what would otherwise be negligence. There is nothing whatever to indicate that Mr. Boyd had such knowledge. On the contrary soon after his talk with Mr. Agassiz he left the Territory and apparently did not return until after the dredger sank. And as to Mr. Campbell, the only evidence is that Mr. Agassiz on one occasion when calling on Mr. Campbell, then a very sick man, at his home, casually remarked that, "We are nearly ready to take the dredger to Pearl Harbor," and that Mr. Campbell said nothing as to the safety of taking the dredger there. Mr. Agassiz also testified that Mr. Campbell knew that they were getting the dredger ready to take to Pearl Harbor, and that they had been for two or three weeks, although he does not state how Mr. Campbell knew this. The failure of a very sick assistant superintendent to raise objections to a friendly caller at his home to a mere casual remark as to what the caller was nearly ready to do could hardly operate as an estoppel against the Territory. It does not appear what authority, if any, Mr. Campbell had in the matter. He may have supposed either that Mr. Boyd had made arrangements for taking the dredger to Pearl Harbor or that when Mr. Agassiz got ready to take her there he would before doing so first complete the conditional arrangements already made with Mr. Boyd. Mr. Agassiz knew as well as Mr. Campbell could have known the arrangements with Mr. Boyd and Mr. Campbell may not have known them at all. Certainly Mr. Agassiz was not seeking Mr. Campbell's

consent as a basis for his action, nor had Mr. Campbell any reason to suppose that Mr. Agassiz would act on his silence. It is said further that Mr. Campbell must have known that the dredger was taken to Pearl Harbor after it was taken there and that he made no objections. If such knowledge can be inferred from the supposed publicity or notoriety of the act, it still would not follow that Mr. Campbell's failure to object would relieve the defendants. The latter had full knowledge of all the circumstances and were in a better position than Mr. Campbell to know whether they were acting rightly or not and they could not reasonably claim and do not claim that they were induced by the silence of that sick man, and it would be the same if he were well, to take the dredger to Pearl Harbor or to keep her there afterwards. They took their chances with full knowledge and cannot say that they were justified in performing negligent acts, if they did so, merely because Mr. Campbell did not follow them about and tell them they ought not to perform such acts.

It is contended further that since the original contract did not specify where the dredger was to be used the defendants had a right to use it at the entrance to Pearl Harbor, or at least that such was the law of the case whether right or wrong as given in defendants' requested instruction 3 as follows: "This agreement allowed the defendants 'the use of the government suction dredger' without confining the place of use to any particular locality. Using the dredger for dredging out the entrance of Pearl Harbor may be presumed to have been contemplated by both parties, consequently the defendants are not necessarily chargeable with negligence by the mere fact of using the dredger at that place, whether the plaintiff expressly agreed that it might be used there or not." As matter of fact the jury might well have found that the parties did not contemplate the use of the dredger at the entrance to Pearl Harbor. The dredger was not a seagoing dredger and had always been used in the harbor of Honolulu, although she was once taken a short distance outside for a day or so, where she was found

unserviceable because of the swell. She was hired by the defendants apparently with special reference to dredging a portion of that harbor, and the defendants themselves when they first contemplated using her at the entrance to Pearl Harbor six or seven months afterwards seemed to think that they required the permission of the superintendent of public works to do so. As Mr. Agassiz testified, he would not take over the Pearl Harbor "job until I got permission to use the dredger on Pearl Harbor. * * * I didn't expect to take it down there without getting permission from Mr. Boyd or some one else in authority; I was not going to sneak the dredger out of the harbor." The instruction of the court must be construed as laying down a rebuttable and not a conclusive presumption as to the use of the dredger at Pearl Harbor. Such construction is perhaps required in order to harmonize the instruction with other instructions that were given. Moreover, the trial judge could hardly have intended to go to the ridiculous extent of saying that because the contract did not expressly confine her place of use to any particular locality the dredger could be used anywhere else however remote or however dangerous the conditions, and he expressly refused to give the instruction in its original form as requested by the defendants, which might have made the presumption conclusive, and modified it by inserting the word "necessarily," which shows that he intended the presumption to be rebuttable. One of the defendants' exceptions was taken to this modification. The plaintiff offered to show a contemporary oral agreement that the dredger was to be used in the harbor of Honolulu only, but this was excluded.

But let us assume that the defendants had a right under their original contract to take the dredger to Pearl Harbor and use her there or, if not, that it was not negligence even if it were a breach of contract to take and use her there, or that the plaintiff through its officers not only knew that the dredger was to be taken or was taken there but even expressly consented and that unconditionally that she might be taken and used there. Still, there would be no estoppel except as to taking and using

her there. There would be no estoppel against setting up negligence in keeping her on the bar in an unprotected condition during rough weather. Permission to take and use her there would not include permission to do so negligently. For instance, permission to take her there would not estop the plaintiff from setting up negligence or claiming damages if she had been lost in an attempt by the defendants to take her there in a severe storm. No more would there be an estoppel by reason of permission to use her there, if she were lost through their negligence in improperly mooring her or in not protecting her by necessary bulkheads or copings or in keeping her there in a severe storm. The defendants contend that she was properly moored there and as to that the plaintiff raises no question. The main question is whether it was negligence to keep her where she was under the stormy conditions that prevailed when she was lost. It does not follow that, as contended, because there was no negligence in mooring her as she was moored and in the place where she was moored and in calm weather on October 30, it was safe and prudent to allow her to remain there during a gradually increasing wind and swell from the ocean. The defendants take the strange position that if it was safe and prudent to place the dredger where she was at the time and under the conditions then prevailing no negligence can be imputed to them for leaving her there under changed conditions because they had no available means of removing her from that position—the tug Fearless being too large to cross the bar, the tug Kaena being too small to handle the dredger in weather that was at all rough, there being no other available tug capable of taking the dredger into Pearl Harbor in rough weather, and it being unsafe for the Fearless to take her in such weather back to Honolulu Harbor. This is an argument that it would not be negligent to place the dredger in a position that might reasonably be expected to become dangerous at any time, without providing also the means for removing her from that position and taking her to a place of safety when the danger should arise. The jury were

instructed in substance that if the defendants negligently put the property into circumstances of such difficulty or peril as to make it impossible for them to save her under those circumstances the defendants would be liable. See plaintiff's requested instruction 15. The point, however, which we wish to make now is that the defendants' right, if they had a right, whatever its source, or the plaintiff's permission, to take the dredger to the entrance of Pearl Harbor or use her there would not include a right or permission to keep her there under dangerous conditions. We shall now proceed to consider whether the evidence was sufficient to justify a finding that it was negligence to keep the dredger where she was and under the conditions existing at the time she sank, and whether that negligence, if there was any, was the proximate cause of the loss.

The defendants contend that there was no negligence in keeping the dredger there and that the loss was not due to such negligence, if there was any, but was due to possible unknown causes, which they contend the plaintiff should have negatived or excluded, or to defects in the construction of the dredger. It is true that no evidence was produced to show what took place between midnight and the time, a little more than two hours later, when the dredger sank; that the burden was on the plaintiff to show negligence on the part of the defendants; that it could not be presumed in the absence of evidence that the defendants were negligent during that time; and that the dredger, so far as the evidence shows, was in good condition and practically free from water at midnight. But it was unnecessary to show any special negligence during those two hours, and, indeed, it is difficult to imagine what the defendants could have done during that period or neglected to do which would have made any difference in the result if the loss was caused, as apparently it must have been, through the water coming over the dredger or into her from the bottom. The negligence, if any, was in placing the dredger there without providing means of taking her to a place of safety in case of danger or in keeping her there without adequate protection in

time of danger. If such negligence was shown, and especially if it was supplemented by evidence tending to show that the dredger was swamped by water coming over her, that might well be considered the proximate cause of the loss until some other sufficient intervening cause should be shown. It was not incumbent on the plaintiff to show beyond a reasonable doubt that the water did not come through the bottom owing to some latent defect in the dredger. It was sufficient to show by a preponderance of evidence that it came over the stern in consequence of the dredger having been left in a dangerous position.

The defendants attempted to show that the loss was caused or might have been caused by defects in the dredger herself which were unknown to the defendants. The only evidence tending in this direction consists of the testimony of Captain Scott of the *Kaena* to the effect that on the morning before the dredger sank, when he happened to go aboard her, there was shaking and the brick work about the boilers was opening and shutting about four inches, and that after the dredger sank he brought up a plank that came out of her deck. The evidence as to the plank is in itself of no significance, for not only did that come out of the deck and not out of the bottom but it came out after the dredger sank, and according to the testimony of Mr. Agassiz the upper part of the dredger began to break up under the action of the waves almost immediately after she sank. As to the brick work, the testimony of this witness might well have been disbelieved by the jury. Taken as a whole it does not make a favorable impression. The fact, if it was a fact, that the brick work was opening and shutting four inches was perhaps the most significant fact that the defendants could rely upon, and yet not one of their other witnesses alludes to it excepting Mr. Agassiz, who says he never heard of it until shortly before the trial—a year and a half after the dredger sank. Even the foreman of the dredger, Haggart, whose attention Captain Scott says he called to the condition of the brick work at the time, says nothing about it. Other things, such as the breaking of the cable, were reported

to Mr. Agassiz, and yet this, which, if true, was most important of all, was not reported to him, nor was any attention paid to it by any one so far as appears, although a number must have noticed it and realized the dangerous condition of the dredger which it indicated if it were a fact. Captain Scott, indeed, goes so far as to say substantially that that indicated to him that the dredger was breaking up, and that he knew pretty well when a vessel was breaking up—and yet it does not seem to have made any impression to speak of upon him at the time, to judge from his actions. It is also probable that the dredger would have leaked badly if she were working so as to open and shut the brick work around the boilers four inches, and yet the defendants contend that there was little or no leaking of an unusual character up to midnight, which was the last time in regard to which there was testimony as to the condition of the dredger before she sank. Mr. Ward, the machinist and engineer who superintended the repairs of the dredger and put in the brick work, testified that it would be an impossibility for the brick work to open and shut in the manner described, because it was held by iron clamps or flanges, and that if such opening or shutting had occurred the clamps or flanges, which were riveted to the boilers, would have broken.

There was ample evidence upon which to base a finding that the defendants were negligent in keeping the dredger where she was under the existing conditions, and, if there was such negligence, the jury was justified in finding that it was the proximate cause of the loss. In the first place the dredger was fully described to the jury and from that description, as well as from the testimony of Captain Macauley, an expert, to whom the dredger was described in a hypothetical question, and who was also personally thoroughly familiar with her, having formerly operated her, the jury could not very well have found otherwise than that she "was not a sea-going dredger." It was also shown by the testimony of several witnesses that rough water might have been expected from time to time at the place where the dredger was moored and indeed that wind and water

as heavy as on the occasion in question were not infrequent at that place. One witness, Haggart, testified also that at noon or a little earlier on the day before the dredger sank she was taking seas, and that during that afternoon she was taking water in over the deck, though not very much, although when he left at six in the evening the water was not coming over. Another, Martin, testified that, although when he retired at midnight the dredger was dry, all the water that came in having been kept pumped out, yet when he was awakened at about 2:20 he found the water in the engine room up to his knees and the sea "coming over the stern of the boat, coming all over it. * * * All the swell that came in ahead of the deck of the boat came all over the boat. * * * Too much water came over. * * * I saw the water come over the stern, when the sea is coming it came all on the deck." It is contended that because the dredger was kept practically dry up to midnight, and there is some testimony on the part of the defendants that the wind had moderated some, the water could not have come over the deck but must have come through the bottom owing to some unknown defect in the dredger, but the fact that the dredger was kept dry up to that time would seem to show more strongly still that the water could not have come through the bottom, for there was ample depth for the dredger and no likelihood of striking below, and it is improbable, or the jury might have so found, that the dredger would begin leaking suddenly so as to let in such large quantities of water. The evidence showed also that the dredger had been thoroughly repaired and was in first class condition only eight months before. The jury may have thought it more probable that she took in a large quantity of water over the stern, as the witness testified, by reason of an unusually large wave or by reason of the sea becoming rougher. One witness testified that for several days the sea grew rougher, although the wind remained about the same. The roughness of the sea, of course, did not depend entirely on the local wind. The waves, as we have seen, came square against the stern of the dredger after her position changed the

day before. Lastly, so far as the evidence on this point need be referred to, there was the testimony of the experts, Captains Macauley and Lorenzen, who replied to hypothetical questions that it would not be safe or prudent for a dredger of this description to be moored in such a place under such conditions. The defendants and the trial judge seem to think that this expert testimony was the only evidence on this question, but, as we have seen, it was not. The plaintiff's requested instruction 12 allowed the jury to find negligence from the other evidence. The effect of the expert testimony is sought to be avoided mainly on two grounds. One of these is that the hypothetical question omitted the essential fact that there was a coping sixteen inches high around the house of the dredger to protect her from the seas washing over the decks. It is not apparent or probable that this would have made any difference in the answers of these experts. Captain Macauley also says that he saw the dredger just before she was taken to Pearl Harbor; he was also familiar with her and it does not appear that the coping was put on after he became familiar with her. This witness also says that "the main fact of her being unsafe there was that she was not a sea-going dredger, and you are always in danger of being swamped by a heavy sea." It is true a special bulkhead had been erected on deck just before the dredger was taken to Pearl Harbor, but it was only across the front just behind the ladder, and of course could afford no protection when the dredger had her stern to the waves. Indeed, we may add in passing, that failure to put a bulkhead all around her when she might part some of her cables and swing around at any time or failure to erect a bulkhead across the stern when she did swing around or failure to haul her back to her original position with bow to the waves, might well be regarded as negligence independently of keeping her on the bar in rough weather. The fact that the defendants used two other dredgers in the same locality is of little importance. They were constructed differently and were apparently better protected from the waves. At most it was a question for the jury. The other

contention in regard to the expert testimony is substantially that it begged the question. The hypothetical question, after setting forth the assumed facts, was as follows: "Assuming these facts to be true, with your experience would you say it was safe or prudent for a dredger such as I have described to be moored in such a place under such conditions?" Captain Macauley's answer was, "Decidedly not." The defendants contend, quoting from the opinion of the trial judge, that "the question might as well have been: * * * 'the dredger having parted her moorings in the storm and having sunk and been lost, was she safely and prudently moored?' or, 'having sunk was she safe?'" and that "only a fool or a knave could answer such a question in the negative" (affirmative), and consequently that the answer amounts to nothing. The question was admitted by the court and not objected to by defendants' counsel. The statement of the assumed facts may not be above criticism but it was not objected to. It need not have referred to the loss of the dredger, but Captain Macauley said that it would not have made a particle of difference in his answer if it had been found that the dredger had not been swamped by water coming over her side or stern. He knew also that she had sunk irrespective of the statement in the hypothetical question. The question, however, was not in substance, as contended, whether the dredger was safely and prudently moored or whether she was safe, but whether it was safe or prudent for her to be moored as described. It was unnecessary to put it in the form in which the defendants and the circuit judge contend it should have been put, namely, whether the mooring of the dredger as described was such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances. The form used is a common form. See *Transportation Line v. Hope*, 95 U. S. 297; *Union Insurance Co. v. Smith*, 124 U. S. 405, 423. Nor can refuge be taken, as is attempted, in Captain Macauley's statements that "it was a prudent thing to moor her where she was moored in fine weather" and that "she was moored all right as I understand

it." The question was not whether it was prudent to moor her there in fine weather but whether it was safe for her to be moored there under the described conditions, that is, the conditions that existed when she sank. The captain makes himself clear in his statements taken as a whole when he says it would be a prudent thing to moor her where she was moored "in fine weather, but very imprudent to keep her there in bad weather;" and when he says in answer to the next question, "No matter what kind of moorings?" "The better the mooring the longer she stayed there, she was moored all right as I understand it;" and in answer to the next question, "The longer she would stay under or above the water?" "The seas coming over, it was a matter of time when she would fill and sink to the bottom; she would fill up and certainly go to the bottom;" and in answer to the next question, "It would not make any difference about the moorings?" "Not a bit; the moorings would hold her there;" and when he says, "I cannot see any reason for keeping her there," and that it would be a proper course to pursue upon the springing up of southerly weather "to bring her into a safe harbor" and that "Pearl Harbor was a safe harbor near there." These statements alone, irrespective of the answers to the long hypothetical question, are sufficient in themselves; and the argument that according to these statements the only act, if any, that was negligent was in keeping the dredger there in rough weather, and that that was not negligent because there was no available means of taking her to a place of safety in such weather has already been answered by showing that it was negligent to put the dredger in a palpably dangerous position without providing means for taking her out of that position when danger approached. As well might it be argued that because it would be prudent to moor her in calm weather with, say, two cables, it would not be negligent to leave her moored so in rough weather because there were no other cables available and no precautions had been taken to have sufficient cables for such weather as might reasonably be expected.

It is contended also that the evidence does not justify a verdict for so large a sum as \$25,000 (1) because there was no direct evidence as to the value of the dredger at the time she was lost, and (2) because portions of the property sued for to the value of \$10,800 were returned. The evidence shows that the cost of the dredger when new, 16 or 17 years ago, was \$65,000; that in 1901 her value was about \$20,000; that repairs to the extent of \$26,000 were then made, and that in the following year, 1902, immediately before the defendants took over the dredger, about \$10,000 was expended in repairs and new machinery; that she was in first-class order and worth \$45,000 when the defendants took her over eight months before she sank, during which period she had been used in the quiet harbor of Honolulu. There was no evidence of any special deterioration during that period, and she was apparently considered by the defendants as in sufficiently good order for extensive use in the comparatively rough water of the Pearl Harbor bar. It is true that the bond for her return in good working order was for only \$10,000, but that is of little significance. There was an obligation to return her irrespective of the bond, and additional security to the amount of \$10,000 might well have been deemed sufficient to cover any damages from causes other than fire that might occur in the harbor of Honolulu. Of more significance is the provision in the contract that she was to be kept insured to the amount of \$20,000 against loss or damage by fire, which would indicate that her value was regarded as of a greater amount. There is nothing to indicate that she deteriorated from a value of \$45,000 to a value of less than \$25,000 in the eight months of her use by the defendants in the harbor of Honolulu or that she was in a bad condition at all when she was lost. Evidence that the defendants obtained marine insurance to the amount of \$20,000 on her when they took her to Pearl Harbor was excluded. The evidence was sufficient to justify a finding that her value was \$25,000 at the time she sank, without any direct evidence, which would naturally be in the form of opinion evidence, as to her value at

the time she was lost, and the trial judge so held on the motion for a new trial. And yet there was such direct evidence, and that from one of the defendants' own witnesses. Captain Parker, who had had much to do with dredgers, and was familiar with this one at the time she was lost, testified: "I could duplicate—rather build a machine with the same capacity, just as good a machine in my estimation, for \$25,000." As to the portions of the property returned, they were not taken to Pearl Harbor at all,—with the exception of the pontoons, which were not a part of the dredger. The complaint alleges that the dredger and other property was hired to the defendants, that the dredger was reasonably worth \$25,000, and that by reason of the failure of the defendants to return the dredger and machinery described in the contract the plaintiff was damaged in the sum of \$25,000. The evidence already referred to applies in large measure to the dredger alone and not to these other things. For instance, Captain Parker's testimony just quoted was given in reply to a question in regard "to the dredger which was sunk in the condition it was in." No claim for damages was made by the plaintiff for the portions of the property that were returned.

The exceptions are overruled.

E. C. Peters, Attorney General, for the plaintiff.

S. H. Derby (Kinney, McClanahan & Derby on the brief) for the defendants.

(Not heretofore reported.)

EX PARTE THURSTON.

HABEAS CORPUS.

SUBMITTED MAY 29, 1901.

DECIDED JUNE 12, 1901.

BEFORE FREAR, C. J., AT CHAMBERS.

The petitioner, having refused as a witness to answer certain questions put to him by the grand jury in the circuit court of the first circuit, was ordered by the court to appear and show cause why he should not be required to answer such questions. He made a showing which the court held insufficient in law as to one of the questions asked, namely, as to the name of a client of his. He contended that he was privileged from answering this on the ground that to do so would be a violation of his confidential relation as attorney to his client. The mittimus, which is set forth in the return, after reciting the proceedings at length, continues: "And the said L. A. Thurston being then and there by the court ordered and directed to appear before the grand jury and furnish to it in response to its interrogatory the name of his alleged client, and the said L. A. Thurston then and there in open court declining to do so,

"It is ordered and adjudged that the said L. A. Thurston be and he is hereby fined in the sum of one hundred dollars;

"And it is further ordered and adjudged that said L. A. Thurston be and he is hereby committed to prison until such time as he shall express his willingness to appear before the said grand jury and answer the interrogatory aforesaid, to wit: to disclose the name of his alleged client," &c.

It appears that the petitioner declined to answer a certain question and that thereupon the court sentenced him to pay a fine and suffer imprisonment. It nowhere appears that the petitioner was convicted of contempt. A person cannot lawfully be

sentenced for the commission of an offense until he has been duly convicted or found guilty of the offense. It may be perfectly clear from the evidence in a criminal case tried before a jury that the defendant has committed a certain offense, but the court cannot sentence him for it until the jury have rendered a verdict of guilty against him. It is equally true that the court cannot in a criminal case heard or tried by itself pronounce sentence until it has found the defendant guilty. A contempt such as it is contended the petitioner committed is a criminal offense and no sentence can be pronounced until after conviction in such a case any more than in other criminal cases. The mittimus does not show that the petitioner was convicted of any offense, nor does it show of what offense he was convicted, if he was convicted of any offense.

In *Ex parte Adams*, 25 Miss. 892, the court "Ordered that George H. Adams be sent to jail, and remain there until he signifies his assent to the court to answer questions to the grand jury, or until final adjournment of said grand jury at this term of court." On habeas corpus before a justice of the high court of errors and appeals, the following language, quoted in Church. Hab. Corp., Sec. 332, was used: "But it is clear that a general order to imprison a party unless he has been convicted either by a jury or by the court is a mere nullity. The law requires that before a sentence of imprisonment shall be passed against a party, he should first be convicted of an offense. In ordinary cases, this conviction must be by the verdict of a jury. In the case of contempts, it may be by the judgment of the court. Still, in either case, the record must show a conviction. Now it will be seen from this return that there is no judgment of imprisonment for a contempt generally, or for a contempt in refusing to answer questions. There is not any conviction or adjudication by the court that Mr. Adams had been guilty of a contempt. Without such judgment the court had no right to commit him to prison, nor the sheriff to detain him. It is true and was admitted on the argument, that Mr. Adams did refuse to answer questions asked by the grand jury, and it may be

true that the court considered that a contempt for which he deserved imprisonment, but no such judgment has been rendered in the case; and however many contempts the prisoner may have committed, it is not lawful to imprison him until convicted thereof by the judgment of the court, which judgment and conviction must appear by the record."

See also *Privett v. Pressley*, 62 Ind. 491; *Ex parte O'Brien*, 127 Mo. 477; *People v. Bennett*, 4 Paige 282; *In re Blair*, 4 Wis. 522; *Sherwood v. Sherwood*, 32 Conn. 1; *People v. Cavanagh*, 1 Parker Cr. R. 588.

The same view seems to be held in England. In *Ex parte Sandau*, 1 Ph. 445, 605, the order after setting forth various recitals went on as follows: "That the said Andrew Van Sandau do stand committed to the custody of the keeper of the Queen's Prison for his contempt of this court in writing, printing, and publishing the aforesaid printed paper, so set out as aforesaid in the schedule to the said petition." The question was whether this amounted to an adjudication that the party had written and published the paper so set out, and that in so doing he had been guilty of contempt. The Lord Chancellor said: "If this form of order had been used for the first time upon the present occasion, and there were no precedents to appeal to on the subject, I should have come to the conclusion that the order was insufficient. I should have considered it necessary that there should have been a direct and distinct adjudication, and not by way of inference and argument merely, that the party accused had committed the act complained of, and that such act was a contempt of the court." He then referred to precedents which contained such direct adjudications and to others which contained indirect adjudications in the form then in question in which the orders contained the words "for his contempt," &c., or their equivalent, and, while commending the former as the more correct and proper, held the latter sufficient in view of the precedents.

In the present case there is not even an indirect adjudication that the petitioner was guilty of contempt.

The only case cited contra that seems to have a bearing on this point is *People v. Nevins*, 1 Hill. 154. The decision in that case is devoted mostly to other questions. There is very little said on this point and that does not commend itself to one's sense of reason. In that case the contempt was a civil contempt. The court seemed to rely to a large extent on special statutes. Whether the case is still regarded as correctly decided in that jurisdiction may be a question. See Bigelow's *Overruled Cases*, page 379, referring to the later case of *People v. Cowles*, 4 Keyes 38, 50, which is not at hand. I would hardly be justified in following *People v. Nevins*, in the light of the other cases above cited.

It will be unnecessary to consider the other points that were raised.

I find that no legal cause has been shown for the petitioner's imprisonment and he is accordingly discharged therefrom.

A. S. Hartwell and Kinney, Ballou & McClanahan for the petitioner.

F. E. Thompson for the respondent.

Decisions Announced without Opinions During the Period Covered by this Volume.

No. 1. V. O. TEIXEIRA, A. J. LOPEZ, J. G. PERREGIL, VICTORINO CARREIRA AND MANUEL SOUSA v. THE AMERICAN DRY GOODS ASSOCIATION, LIMITED, L. B. KERR & COMPANY, LIMITED, AND L. B. KERR. Petition filed November 1, 1905, for rehearing on the grounds that the decision filed herein October 12, 1905, is not in conformity with the law therein declared and that the conclusions of fact as stated by the court are inadvertent and not justified by the record. Decided November 8, 1905, without argument under Rule 5. *Per curiam*. The petition is denied. *H. E. Highton* for petitioner.

No. 22. KOOLAU MAILE, FORMERLY KOOLAU KAIKAINAHAOLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN W. KAIKAINAHAOLE, DECEASED, ETHEL H. AND HERMAN M. KAIKAINAHAOLE, MINORS, BY THEIR GUARDIAN KOOLAU MAILE, AND JOHN KAIKAINAHAOLE, A MINOR, BY HIS GUARDIAN AD LITEM KOOLAU MAILE v. JOSEPH O. CARTER AND ALLEN & ROBINSON, LIMITED, AND PAUL MUHLENDORF, M. P. ROBINSON, J. O. CARTER AND BATHSHEBA M. ALLEN, TRUSTEES UNDER THE WILL OF SAMUEL C. ALLEN, DECEASED. Petition filed November 6, 1905, for rehearing of the case decided, ante p. 49, on the grounds: (1) that under the special circumstances alleged the mortgagee became a trustee for the widow and heirs of the mortgagor and as such was legally required to account and have the balance due ascertained before he could exercise his right under the power; (2) that upon well established principles of law under the allegations an accounting was a condition precedent to the exercise of the right of foreclosure; (3) that equity should set aside the foreclosure

and allow the widow and heirs to redeem in view of the alleged special facts that the mortgagee knew that unless the claim was presented to the administratrix she could not legally pay the debt out of the estate and that there was no legal obstacle to the presentation of the claim and that the failure to present it would probably result in the acquisition of the land for the mortgagee; (4) that in view of the fact that neither the widow nor the heirs had separate funds in their hands this is one of the cases in which equity exists for the purpose of administering adequate relief; (5) that under the allegations this is not one of the cases in which the rights of minor heirs may be cut off by foreclosure and that to deprive them of the right to redeem would produce inequitable consequences; (6) that equity seizes upon slight circumstances to relieve minors from the strictness of the law and that sufficient circumstances are alleged in this case; (7) that no demand for an accounting was required by law prior to the foreclosure, but that when the demurrer was sustained below leave to amend in this respect was made and refused, which fact is not referred to in the opinion; (8) that it is inaccurate to hold that the mortgagee might rely upon the powers contained in the mortgage irrespective of the statute which provides for notice of intention to foreclose, etc., and (9) that the bill alleges that proper entry was not made. Decided November 8, 1905, without argument under Rule 5. *Per curiam*. The petition is denied. *H. E. Highton* and *C. W. Ashford* for petitioners.

NO. 42. FRANK LUCWEIKO v. TERRITORY OF HAWAII AND HONOLULU RAPID TRANSIT & LAND CO. Petition for rehearing. Filed February 5, 1906. Decided February 21, 1906. The plaintiff seeks a rehearing mainly on the grounds that it does not appear that the defendant company was in the position of a bona fide purchaser for value or that if it was it took

without notice of nonperformance of the agreement by the Territory, that the bill covers property other than that occupied by the company, and that the question as to the position of the company as a bona fide purchaser without notice was not raised. *Per curiam*. Petition denied. *C. Creighton and G. D. Gear* for petitioner.

NO. 50. TERRITORY OF HAWAII, BY C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS, v. E. J. COTTON, C. E. COTTON AND JAMES B. AGASSIZ, PARTNERS UNDER THE NAME OF COTTON BROS. & CO. Error to circuit court, first circuit. Petition filed March 23, 1906, for rehearing of defendants' motion to quash the writ. (For decision on motion, see ante, p. 445.) Decided April 11, 1906. *Per curiam*. The petition is denied. *Kinney, McClanahan & Cooper* for petitioner.

NO. 70. JAMES L. HOLT, TAX ASSESSOR, PLAINTIFF, v. A. TULLETT, DEFENDANT, I. I. S. N. CO., LTD., GARNISHEE. Appeal from district court, Honolulu. Petition for rehearing. Submitted April 7, 1906. Decided April 11, 1906. *Per curiam*. The petition is denied. *M. F. Prosser, Deputy Attorney General*, for petitioner.

NO. 75. ANNA GERTZ IN HER OWN BEHALF AND AS EXECUTRIX OF CHRISTIAN GERTZ, DECEASED, v. C. H. BANNING AND B. R. BANNING, J. ALFRED MAGOON IN HIS PERSONAL CAPACITY AND AS TRUSTEE FOR C. H. BANNING AND B. R. BANNING,

JOHN BUCKLEY AND MARIA J. FORBES. Appeal from circuit judge, first circuit. Submitted April 2, 1906. Decided April 23, 1906. This is a bill in equity for the cancelation of a certain mortgage dated December 11, 1894, and the foreclosure thereof in January, 1896, for a writ of possession of the land described in said mortgage and for damages by reason of the alleged wrongful foreclosure. A demurrer to this bill was sustained by the circuit judge. It appears from the bill that on April 6, 1901, complainant filed a bill setting forth the same facts and praying for the same relief. The circuit judge sustained a demurrer to that bill and the suit was dismissed in June, 1901. From that decree no appeal was taken. On March 31, 1902, complainant filed a motion for a rehearing of the decision on the demurrer in that suit and for leave to amend the bill. That motion was denied by the circuit judge. An appeal was taken to this court from the order denying that motion, which order was affirmed on March 6, 1903, and a rehearing denied on May 18, 1903. 14 Haw. 696. *Per curiam*. The decree appealed from is affirmed and the appeal is dismissed. Plaintiff in person. *Magoon & Lightfoot* for defendants.

NO. 85. GERHARDINE HARKBARTH V. ALBERT HARKBARTH. Appeal from circuit judge, fifth circuit. Submitted April 28, 1906. Decided May 1, 1906. This is an appeal from a decree of divorce on the ground of extreme cruelty, the libellee being required by the decree to pay the libellant \$10 a month alimony, and also that the appeal from the decree should not stay the payment of the alimony pending its final adjudication; the libellee being further required by the decree to pay all costs, expenses and fees of the trial and also \$25 as compensation allowed by the court for the libellant's counsel. The appeal was taken on the grounds: "1. That said court was without jurisdiction to grant said divorce. 2. That said decree was

contrary to the evidence. 3. That said decree is erroneous in decreeing 'that appeal from this decree shall not stay the payment of said alimony, pending final adjudication of said appeal,' and also the attorney fees 'taxed and considered as part of the costs of court herein'." *Per curiam*. The decree was sustained by the evidence and is affirmed by the court. *J. D. Willard* for libellant. Libellee in person.

RESOLUTION.

WHEREAS: It has pleased God to take from us the Honorable WILLIAM NEVINS ARMSTRONG, a member of this Association, and a former Attorney General of the Kingdom of Hawaii, be it

RESOLVED, That we, the members of the Bar Association of the Hawaiian Islands, do hereby record our appreciation of the industry, integrity and ability which distinguished WILLIAM NEVINS ARMSTRONG in all his undertakings throughout a long and well-spent life, and do express our deep sense of the loss which the community and the nation have suffered by his death;

BE IT FURTHER RESOLVED, That we tender to the members of the family of the deceased our sincere sympathy with them in their affliction.

That these resolutions be presented to the Supreme Court of the Territory of Hawaii and motion made for their entry upon the record.

Honolulu, T. H., October 23, 1905.

Rules of the Supreme Court.

IN FORCE MARCH 21, 1906

1. ENTRY OF CASES ON CALENDAR.

1. The clerk shall place upon the calendar each case brought to or pending in this court in its proper chronological order and forthwith give notice thereof to the parties.

2. If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution. Failure of the stenographer to furnish a transcript of the evidence shall not excuse delay unless within ten days after the filing of the decree, judgment or verdict sought to be set aside the appellant shall have obtained from the lower court or judge a direction to the stenographer to prepare and furnish the desired transcript in the regular order of cases tried or in such other order as the court or judge shall direct, which direction may be conditioned on the appellant's making a deposit or giving security for the estimated cost of the transcript.

2. CALL AND ORDER OF CALENDAR.

1. Cases will be called for argument or trial in the order in which they stand on the calendar except as hereinafter provided or otherwise ordered. Sessions will be held beginning on the first Monday of each month during the term unless otherwise ordered.

2. If the parties, or either of them, shall be ready to proceed when the case is called, the same will be heard, unless otherwise ordered for good cause shown. If neither party shall

be ready, the case may be postponed or go to the foot of the calendar, as the court may order.

3. If a case is called at two sessions, and upon the call at the second session neither party is ready to proceed, it may be dismissed unless sufficient cause is shown for further postponement.

4. Criminal cases, cases in which the Territory is concerned and which also involve or affect some matter of general public interest, cases once adjudicated by this court on their merits and again brought up, writs of habeas corpus and extraordinary writs, may be advanced by leave or order of the court.

5. Two or more cases involving the same question may, by leave or order of the court, be heard together, to be argued as one case or more, as the court may order.

6. Any case may, by filed stipulation, be submitted on briefs without oral argument at any time during the term, irrespective of its position on the calendar.

7. Except as aforesaid, no case will be taken up out of its order on the calendar or be set down for any particular day except upon special and peculiar circumstances to be shown to the court.

8. No stipulation or agreement of the parties to advance, pass or postpone a case, or to substitute one case for another, shall be binding upon the court. A case may be so advanced, passed, postponed or substituted only upon application made and leave granted in open court.

3. BRIEFS.

1. Within fifteen days after an appeal case has been placed on the calendar the appellant shall file a printed or typewritten brief and two copies thereof and a certificate of service of a copy thereof upon the appellee.

2. Within ten days after receipt of a copy of the appellant's brief the appellee shall file a printed or typewritten brief and two copies thereof and a certificate of service of a copy thereof on the appellant.

3. Within five days after receipt of a copy of the appellee's brief the appellant may file a brief confined strictly to matter in reply to the appellee's brief.

4. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

5. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

6. In cases brought originally in this court, briefs shall be filed on both sides at or before the argument, unless otherwise ordered by the court.

7. When evidence is referred to in a brief the page or pages on which it appears in the transcript shall be stated.

4. ORAL ARGUMENTS.

1. The appellant or, in original cases, the petitioner, shall be entitled to open and conclude the argument of the case; but when the questions on appeal arise solely upon demurrer, or otherwise solely upon the pleadings, the order of argument shall be the same as in the court below. When there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Not more than two hours on each side will be allowed for argument without special leave of the court granted before the argument begins.

5. REHEARING.

A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave granted during such twenty days; and

shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled.

6. MOTIONS.

1. All motions shall be reduced to writing. No facts will be considered unless shown by the record or by affidavit.

2. A copy of the motion shall be served on the opposite party not less than forty-eight hours before the hearing, unless otherwise ordered by the court.

3. The motion day shall be the first day of each stated session.

4. Any motion of which notice shall have been given to the clerk in advance, shall be entered on the clerk's list in the order in which he receives such notice, and shall have priority in that order before other motions.

5. Not more than half an hour on each side shall be allowed for argument of a motion, without special leave of the court before the argument begins.

6. There may be united with a motion to dismiss, a motion to affirm on the ground that, although the record may show that the case is properly before this court, it is manifest that the appeal was taken for delay only or that the question involved is such as not to need further argument.

7. TRANSCRIPTS OF EVIDENCE.

[Repealed.]

8. APPEAL, ERROR AND EXCEPTIONS FROM CIRCUIT COURTS AND CIRCUIT JUDGES.

1. On appeal, error or exceptions from a circuit court or circuit judge, no original papers other than bills of exceptions, transcripts of evidence and exhibits, shall be transmitted to this court unless by order of the court or a justice thereof. Original

transcripts and exhibits may be returned to the circuit court or judge upon the determination of the case in this court unless otherwise ordered. Copies of papers shall be printed or typewritten and certified.

2. Bills of exceptions shall contain only such papers and statements as are necessary for the disposition of the questions of law raised by the exceptions. No papers shall be made a part thereof by reference unless specifically named.

9. WRITS OF ERROR.

Cases brought up by writ of error, as well as those brought up by appeal or bill of exceptions, shall retain the title of the case below without reversing the order of the names.

10. COSTS.

1. Attorneys shall be liable for costs of court incurred by their respective clients.

2. Bonds for costs on appeal to the Supreme Court shall be made to the Clerk of the Judiciary Department, filed in the court from which the appeal is taken and forwarded by such court to the Supreme Court.

11. MANDATE.

Whenever appropriate upon the determination of a matter in this court a notice or mandate shall be issued to the court below informing that court of the proceedings in this court or directing further proceedings in that court as to law and justice may appertain. The notice or mandate may issue at any time on the order of the court or a justice thereof, but, unless otherwise ordered by the court or a justice thereof, it shall issue as of course after ten days from the rendition of judgment.

12. PAPERS.

No paper shall be taken from the files of the court except by permission of the court or a justice thereof.

13. LIBRARY.

No book, pamphlet or magazine shall be taken from the library of this court, except for use in this court or in the Circuit Court of the First Circuit, without the permission of a justice of this court or a judge of said Circuit Court; provided, however, that any member of the bar may take one or more text books, not exceeding three at any one time, upon giving a receipt therefor to the librarian or making an entry thereof in a book kept by the librarian for that purpose; and provided further that books may be taken for use in the United States District Court or by the United States District Judge upon the taker giving a receipt or making an entry. The taker of any book, pamphlet or magazine shall be responsible for the due return of the same within three days, or sooner if so required by the librarian, and, in case the same shall not be so returned, shall forfeit and pay fifty cents for each day's detention thereof beyond the time limited until the return thereof or the payment of twice the value thereof or cost of replacing the same. Any one taking a book, pamphlet or magazine without such permission or without giving such receipt or making such entry, as the case may be, shall be liable to suspension from the use of the library.

14. APPEALS FROM DISTRICT COURTS.

District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made and the points of law upon which the appeal is taken; also, the summons or warrant, all vouchers and exhibits filed, or certified copies thereof, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but

statutory fees and mileage, and stating explicitly what is kept back.

15. DEFENSE OF TITLE IN DISTRICT COURTS.

Whenever, in the District Court, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdiction in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

16. ADMISSION TO THE BAR.

1. Each applicant for admission to the bar shall file with the clerk an application setting forth his name, age, nationality, last place of residence and the character and term of his study. Sufficient certificates of the applicant's good moral character, and, if he is a member of the bar of any other court, the certificate of admission to such bar, shall accompany the application.

2. No applicant who is not a member of the bar of the highest court of some other state, territory or country, will be admitted or examined for admission to practice in this court unless, as a part of his preparation, he shall have studied diligently at least two years in a law school or the office of a competent attorney, or partly in such school and partly in such office.

3. No person who is not a citizen of the United States will be admitted unless he shall have bona fide declared his intention to become a citizen in the manner required by law.

4. No applicant whose application has been denied shall apply again for admission within one year thereafter.

17. DEFINITIONS.

Within the meaning of the rules of this court, whenever appropriate, appeal cases include cases brought up on bill of exceptions or writ of error, "appellant" and "appellee" include the plaintiff and defendant in error respectively; and "party," "appellant" and "appellee" and other words denoting the parties include their counsel.

RULES PRESCRIBED BY THE SUPREME COURT
RELATING TO GRAND JURIES.

1. WHEN REQUIRED.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." U. S. Const., Amend., Art. 5.

2. HOW DRAWN.

"Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries." Org. Act, Sec. 83.

3. QUALIFICATIONS OF JURORS.

"No person who is not a male citizen of the United States and twenty-one years of age and who cannot understandingly speak, read and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii," "and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors." Org. Act, Sec. 83.

4. NUMBER OF JURORS.

"The number of grand jurors in each circuit shall be not less than thirteen" nor more than twenty-three. See Org. Act, Sec. 83.

5. SESSIONS.

Until otherwise provided by the legislature of the Territory, grand juries * * * shall sit at such times as the circuit judges of the respective circuits shall direct." Org. Act, Sec. 83.

6. CHALLENGES.

Before the grand jury retires, the prosecuting officer or any person held to answer a charge for a criminal offense, may challenge the panel or an individual juror, for cause to be assigned to the court. All such challenges shall be tried and determined by the court.

7. FOREMAN.

From the persons summoned to serve as grand jurors and appearing the court shall appoint a foreman, and may remove him for cause. The court may appoint another foreman when the necessity arises.

8. OATH OF GRAND JURORS.

Substantially the following oath shall be administered to the grand jurors:

"You, and each of you, do solemnly swear [or affirm] that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge touching this present service; that you will present no one through envy, hatred, or malice, nor leave any one unrepresented through fear, favor, affection, gain, reward or hope therefor, but will present all things truly as they come to your knowledge, according to the best of your understanding; and that you will keep secret the proceedings had before you."

9. CHARGE OF THE COURT.

The grand jury, being impanelled and sworn, shall be charged by the court. In doing so, the court shall give them such information as it may deem proper as to their duties and as to the law pertaining to such cases as may come before them. The court may further charge the jury when the necessity arises.

10. OFFICER IN ATTENDANCE.

The court may appoint an officer to attend upon the grand jury.

11. RETIREMENT OF THE GRAND JURY.

The grand jury shall then retire to a private room and inquire into the offenses cognizable by them.

12. CLERK.

The grand jury may appoint one of their number to be their clerk, to preserve minutes of the proceedings before them, which minutes shall be delivered to the prosecuting officer, when so directed by the grand jury.

13. SUBPOENA OF WITNESSES.

"The several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts." Org. Act, Sec. 83.

14. SWEARING WITNESSES.

Witnesses appearing before the grand jury may be sworn in open court or by the foreman of the grand jury, or, in his absence, by any member thereof.

The oath or affirmation may be substantially as follows:

"You do solemnly swear [or affirm] that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth."

15. PRESENCE OF OTHERS WITH JURORS.

The prosecuting officer or any member of the grand jury may interrogate witnesses before the grand jury. The prosecuting officer shall advise the grand jury in regard to the law of the cases that come before them, and draw the indictments.

An interpreter may be present at the examination of witnesses before the grand jury.

Except the prosecuting officer, interpreter, and witnesses under examination, no person shall be permitted to be present during the session of the grand jury.

No person except the members of the grand jury shall be permitted to be present during the expression of their opinions, or the giving of their votes.

16. TWELVE GRAND JURORS TO CONCUR.

No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.

17. INDORSEMENT BY FOREMAN AND PROSECUTING OFFICER.

An indictment when found shall be indorsed, "A true bill," and such indorsement shall be signed by the foreman. An indictment shall be indorsed also by the prosecuting officer. A presentment, when made, shall be signed by the foreman.

18. PRESENTING AND FILING.

Indictments or presentments, when found, shall be presented by the foreman, in the presence of the other grand jurors, to the court, and shall there be filed; but such as are found for a felony against any person not in custody or under recognizance, shall not be open to the inspection of any person except the prosecuting officer until the defendant therein shall have been arrested.

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CHILDREN.

1. Children of an adulterous intercourse not legitimized by parents' subsequent marriage. *Kealoha v. Castle*, 45.
 2. Evidence of mother not admissible to prove illegitimacy of child. *Godfrey v. Rowland*, 577.
- See GUARDIAN and WARD.

COMMERCIAL PAPER.

See NEGOTIABLE INSTRUMENTS.

COMMISSIONER OF PUBLIC LANDS.

The Commissioner of Public Lands does not have authority over "town lots" which include remnants of land in Honolulu not contained in any grant, not needed for any public purpose, and not within any contemplated public use. *Pratt v. Holloway*, 539.

CONSTITUTIONAL LAW.

1. It is infamous punishment to take a person through the public streets in the uniform used in jail and compel him to work in the public view in association with felons. *Ex rel Wong Lung*, 168.
2. Where a conviction for a lesser crime cannot be had under an indictment for a greater which includes it, a conviction of the lesser crime is no bar to a prosecution of the higher crime.

CONSTITUTIONAL LAW.—Continued.

The defendant is not twice in jeopardy for the same offense. *Territory v. Schilling*, 249.

3. A statute prohibiting spraying clothes with water from the mouth in laundering them is a valid health regulation and not class legislation. *Territory v. Ah Choy*, 331.

4. An adjudication of contempt can be made in absence of defendant. *In re Anin*, 338.

5. The title of an act to authorize licenses for the retail of wines, etc., is sufficient to authorize a section providing a penalty for violations of conditions expressed in such licenses. *Territory v. Wong Feart*, 353.

6. Statute requiring \$10 annual fee from surgeons licensed after passage of the act and not from those already licensed, is void for unlawful discrimination. *Territory v. McDonald*, 389.

7. A sentence to imprisonment for a misdemeanor does not become infamous punishment by reason of the convicted person being confined in Honolulu jail. *Ex parte Higashi*, 428.

8. A right of trial by jury in the first instance for a misdemeanor is waived by a defendant not demanding a jury when brought before a magistrate for trial. *Ibid.*

9. §2161 R. L. concerning foreclosures is not unconstitutional because failing to specify kind and place of publication of notice of mortgagor's intention to foreclose. *Carter v. Kaikainahaole*, 528.

10. The Revised Laws were enacted as a whole by the legislature, and Act 3 Laws of 1905 by which it did so is not void because enacting the Revised Laws by reference, and contains but one subject which is expressed in its title. *In re Tom Pong*, 566.

CONSTRUCTION.

1. Regulate construed to mean "make". *County of Oahu v. Whitney*, 181.

2. Receipts construed as powers of attorney. *McClanahan v. Trent*, 190.

3. It is only with reference to ambiguous, uncertain or incomplete terms in a contract that a construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract. *Lowrey v. Territory*, 285.

4. Evidence of members of legislature inadmissible for purpose of determining construction of statute. *Trent v. Fisher*, 612.

See STATUTE.

CONTEMPT.

1. A refusal of a witness sworn to testify before a grand jury to answer a proper question is a direct criminal contempt and exceptions do not lie to review a judgment of a circuit court in such a case. *In re Anin*, 336.
2. A judgment for contempt may be rendered in absence of defendant from court room. *In re Anin*, 338.
3. It is not contempt for a witness before a grand jury to violate an oath of secrecy as such oath is not authorized. *In re Anin*, 341.
4. A person may not be sentenced for contempt of court until he is found guilty of the crime and the mittimus must show that the defendant has been so convicted. *Ex parte Thurston*, 639.

CONTRACTS.

See ASSUMPSIT; CONSTRUCTION, 3.

1. A promise to pay when deed secured held to be promise to pay within reasonable time and not upon condition. *Castle v. Smith*, 32.
2. For extras in government work and wages of government inspector. *Amer.-Haw. Eng. & Con. Co. v. Ter. of Hawaii*, 195.
3. It is only with reference to ambiguous, uncertain or incomplete terms in a contract that a construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract. *Lowrey v. Territory*, 285.
4. An agreement to cultivate sound literature and solid science in a school not violated by converting it to a technical and agricultural school. *Ibid.*
5. Equity will not compel one to perform a contract that was entered into by mistake as to its contents. *Armstrong v. Keone*, 342.
6. Reasonable agreement in partial restraint of trade held to be legal and not contrary to Sherman act of 1890. *Haw. Carriage Co. v. Schuman Carriage Co.*, 495.
7. A corporation in its own interests may contract with another for the performance of corporate acts which its charter authorizes it to do itself. *Haw. Carriage Co. v. Schuman Carriage Co.*, 495.
8. Contracts for sale of land. *Campbell v. Lucas*, 520.

CORPORATIONS.

1. Counties are corporations within the meaning of the quo warranto statute. *Kanealii v. Hardy*, 9.
2. A corporation has no authority to endorse a note in order to enable maker to get credit. *Thompson v. Whitney & Marsh*, 109.

CORPORATIONS.—Continued.

3. A corporation cannot engage in business outside of its chartered purposes. *Ibid.*
4. The income tax of a corporation is assessable in the taxation division in which it resides if it resides in the Territory, otherwise in the division in which its property is situated. *County of Kauai v. Holt*, 146.
5. A Hawaiian corporation resides in the tax division in which it holds its stockholders and directors' meetings, keeps its stock books and has its principal office. *Ibid.*
6. Payment of a license fee by a foreign corporation is made under duress within the law of involuntary payments when it is made under protest upon the demand of the treasurer under a statute which denies a delinquent corporation the benefit of the laws of the Territory. *Seattle B. & M. Co. v. Treasurer*, 364.
7. A corporation in its own interests may contract with another for the performance of corporate acts which its charter authorizes it to do itself. *Haw. Carriage Co. v. Schuman Carriage Co.*, 495.
8. Not necessary to aver that contract of corporation was authorized by resolution of the stockholders. *Ibid.*
9. Persons who hold themselves out as a corporation cannot be found guilty of a misdemeanor for not filing the annual exhibit of the corporation. *Territory of Hawaii v. Smith*, 561.

COSTS.

1. Costs in equity are largely in discretion of trial judge. *Ahana v. Wa Yat*, 326.
2. A witness who is a party is not entitled to a witness fee, with few exceptions. *Rodrigues v. Teixeira*, 489.
3. §1889 Revised Laws applies to cases before circuit judges at chambers as well as to term cases. *Ibid.*
4. Party partly responsible for error granted new trial only on condition of paying all costs to date. *Kingham v. H. R. T. & L. Co.*, 547.

COUNTIES.

1. A circuit judge must pass upon the bond of a county supervisor even though proceedings to test the title of the supervisor on the ground that his nomination papers are forged, are impending. *Kanealii v. Hardy*, 1.
2. Counties are corporations within the meaning of the quo warranto statute. *Kanealii v. Hardy*, 9.
3. A county sheriff has power to appoint police officers without the approval of the board of supervisors, the high sheriff or the attorney general. *Ter. of Hawaii v. Knell*, 135.

COUNTIES.—Continued.

4. County auditor has right to refuse to draw a warrant for an illegal claim though approved by board of supervisors. *Lyman v. Maguire*, 142.
5. County board of supervisors has no power to appoint a sheriff's clerk. *Ibid.*
6. The legislature has power to delegate to the county boards of supervisors power to make ordinances relating to gambling. *County of Oahu v. Whitney*, 174.
7. Sec. 62 subd. 5 of organic act authorizes county boards of supervisors to enact an ordinance relating to gambling but perhaps not to impose imprisonment as a penalty. *Ibid.*
8. County ordinances do not require enacting clauses. *Ibid.*
9. Violation of a county ordinance against gambling held to be a criminal offense properly prosecuted in name of Territory and within jurisdiction of a district magistrate. *Ibid.*
10. County treasurer has no right to decline to pay a warrant allowed by the board of supervisors. The only way in which payment of an illegal claim can be prevented after a warrant has been issued is by injunction of court. *McClanahan v. Trent*, 190.
11. Claimants against county may assign their claims and warrants may be issued by auditor to assignee. *Ibid.*
12. An auditor properly issued a warrant for amount of claims of certain laborers in road work in name of chairman of road board who had given him the laborers' receipted bills in form of a pay roll. *McClanahan v. Trent*, 190.
13. The election of a county supervisor is not void because the signatures to the petition for his nomination were forged *Willis v. Kanealii*, 243.
14. County supervisors have no authority to make imprisonment a penalty for violation of a county ordinance. *Territory of Hawaii v. Ah Choy*, 331.
15. The County of Oahu has power to appropriate county funds for repairs to a dray used in Kapiolani Park and for maintenance of a road in that park, without purchasing or holding the park. *Pacific Oil Co. v. Bicknell*, 575.
16. Counties are entitled to 50% of taxes collected after establishment of county government but which became due and delinquent before. *Trent v. Fisher*, 612.

COURTS.

1. A circuit judge must pass upon the bond of a county supervisor elect, without waiting for settlement of question whether his nomination papers are forged. *Kanealii v. Hardy*, 1.

COURTS.—Continued.

2. A circuit judge has jurisdiction over a quo warranto proceeding instituted to oust a supervisor elect of a county on the ground that his nomination papers were forged. *Kanealii v. Hardy*, 9.
3. A term of the circuit court does not lapse by failure to open on day designated by statute when such day is legal holiday. *Territory of Hawaii v. Ah On*, 19.
4. Supreme court has no authority in passing upon exceptions to render judgment affirming judgment of a circuit court. *Meheula v. Pioneer Mill Co.*, 91.
5. Violation of county ordinance against gambling held to be an offense within jurisdiction of a district magistrate. *County of Oahu v. Whitney*, 174.
6. A judge of the supreme court is not disqualified from having been nominally of counsel. *Love v. Love*, 194.
7. Law limiting civil jury trials in the first circuit unless by consent to the first sixty days of each term is not contrary to §45 of organic act. *Ahmi v. Buckle*, 200.
8. Comments of court upon course of defendant's attorney held proper. *Territory v. Schilling*, 249.
9. Circuit courts of the Territory have jurisdiction to naturalize aliens. *Territory v. Morita Kaizo*, 295.
10. It is a direct criminal contempt of court for a witness sworn to testify before a grand jury to refuse to answer a proper question and exceptions do not lie to review a judgment of a circuit court in such case. *In re Anin*, 336.
11. A circuit judge has no authority to require an oath of secrecy from witnesses before a grand jury. *In re Anin*, 341.
12. A justice of the supreme court is not disqualified to sit in a case by reason of having been counsel in the case. *Notley v. Brown*, 393; *Ex parte Higashi*, 428.
13. District courts have jurisdiction in actions of trespass quare clausum fregit unless the title to real estate is in question. *Paris v. Scott*, 426.
14. On appeal from a district court the circuit court will have jurisdiction of a case involving title to real estate, where that did not appear in the district court. *Ibid.*
15. Where a trespass suit involves title to real estate a district magistrate should decline to try the case whether defendant objects or not and a circuit court on appeal has no jurisdiction of such a case. *Roy v. Scott*, 598.

CRIMINAL LAW.

See CORPORATIONS.

1. §2864 Revised Laws providing that no person tried for a misdemeanor upon facts that amount in a law to a felony, shall

CRIMINAL LAW.—Continued.

be liable to be afterwards prosecuted for felony on the same facts, applies to jury trials only and not convictions by district magistrates. *Territory v. Schilling*, 249.

2. Counties can not make imprisonment a penalty for violation of a county ordinance. *Territory of Hawaii v. Ah Choy*, 331.

3. Sentence is not void, though arrest be made illegally without a warrant. *In re Akamu*, 487.

4. A sentence or mittimus wrongfully containing the words "at hard labor" is not absolutely void. "Hard labor" may be regarded as surplusage and the sentence or mittimus amended. *Ibid.*

See ASSAULT AND BATTERY; COURTS, 5, 10, 11; CONTEMPT; EVIDENCE, 5, 12, 13, 14; EMBEZZLEMENT; GAMBLING; HABEAS CORPUS; JUDGMENT, 6, 9; JURIES, 5, 6, 7; JURISDICTION, 3, 4; MALICIOUS PROSECUTION; PLEADING AND PRACTICE, 6, 7, 10; RAPE; WAIVER, 2.

DAMAGES.

Evidence as to whether ejection from cars was proximate cause of loss of employment. *Kingham v. H. R. T. & L. Co.*, 547.

DEFINITIONS.

1. A lease is not a "transfer of real estate" within the meaning of §2381 Revised laws. *Takahashi v. Kualu*, 87.

3. Clerk.

2. Regulate construed as "make." *County of Oahu v. Whitney*, 181.

DESCENT.

Children of an adulterous intercourse not legitimized by parents' subsequent marriage. *Kealoha v. Castle*, 45.

DIVORCE.

1. In a divorce case to obtain jurisdiction over a defendant outside the Territory by personal notice, he must be notified when to appear. It is not sufficient that he be given a summons in the usual form. *Zeave v. Zeave*, 463.

2. Proper for trial court to make decree that appeal shall not stay payment of alimony and attorney's fees taxed and considered as part of the costs of court. *Harkbarth v. Harkbarth*, 646.

DOWER.

Equity has no jurisdiction to determine right of dower, when widow denies that she has any dower right. *Ahin v. Opele*, 525.

EJECTMENT.

1. Declaration may be amended after close of defendant's case so as to claim less land. *Meheula v. Pioneer Mill Co.*, 56.

EJECTMENT.—Continued.

2. A landlord is not estopped by a judgment against a tenant. *Castle v. Kapiolani Estate, Ltd.*, 61.
 3. Where an executor is substituted as plaintiff without objection by defendant an exception to the decision as contrary to the law and the evidence and the weight of evidence does not raise the question that the executor is not a proper plaintiff. *Magoon v. Pioneer Mill Co.*, 159.
 4. In ejectment by purchaser at mortgage foreclosure against persons claiming title from the mortgagor it is unnecessary for plaintiff to show the mortgagor's title. *Carter v. Kaikainahaole*, 528.
 5. An answer in ejectment denying every allegation in complaint authorizes a ruling that defendant is holding possession against the plaintiff's rights. *Ibid.*
 6. A co-tenant may recover verdict for whole land against a stranger. *Godfrey v. Rowland*, 577.
- See EVIDENCE.

ELECTIONS.

1. A circuit judge must pass upon the bond of a county supervisor elect, without waiting for settlement of question whether his nomination papers are forged. *Kanealii v. Hardy*, 1.
2. A circuit judge has jurisdiction over a quo warranto proceeding instituted to oust a supervisor elect of a county on the ground that his nomination papers are forged. *Kanealii v. Hardy*, 9.
3. All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election in general should be held directory only, in support of the result, and the election of a county supervisor is not void because the signatures to the petition for his nomination were forged. *Willis v. Kanealii*, 243.

EMBEZZLEMENT.

Where a defendant has paid money to another under a mistaken belief that the receiver is agent of the owner of the money defendant is not guilty of embezzlement. When such defense is made it is improper to give the jury instructions as to the law of agency which might be appropriate in a civil action against defendant for recovery of the money. *Territory v. Richardson*, 231.

EQUITY.

1. Conspiracy to wreck a corporation held not shown. *Terra v. Amer. Dry Goods Assn.*, 41.

EQUITY.—Continued.

2. Mortgage not cancelled as proof of mistake not clear. *Scott v. Hackfeld & Co.*, 66.
3. Duress, mistake and undue influence held not sufficiently shown to warrant setting aside of a trust deed. *Cummins v. Carter*, 71.
4. Judgment should not be given to plaintiffs on pleadings in a suit to quiet title when the answer denies plaintiff's title. *Charman v. Charman*, 171.
5. Jurisdiction of equity in quieting title is by a bill of peace or by a bill to remove a cloud. *Ibid.*
6. Deed to Territory will not be rescinded in equity for breach of covenant when the H. R. T. & L. Co., without notice of the breach of covenant, has acquired rights in the land for street railway purposes. *Lucweiko v. Territory*, 303.
7. Master's report not disturbed unless error is clear. *Ahana v. Wa Yat*, 326.
8. Costs in equity in discretion of trial judge. *Ibid.*
9. Plaintiff held not prevented by laches from moving for confirmation of master's report. *Ibid.*
10. Equity will not compel a defendant to perform a contract entered into by mistake. *Armstrong v. Keone*, 342.
11. Evidence held not to show fraud, undue influence or duress sufficient to justify decree setting aside deed from wife to husband through intermediary. *Kahula v. Kanewanui*, 466.
12. Jurisdiction in suits upon accounts when the nature of the account is such that it cannot be conveniently and properly settled at law. *Haw. Carriage Co. v. Schuman Carriage Co.*, 495.
13. No jurisdiction in equity in suit for admeasurement of dower where widow denies having dower right. *Ahina v. Opele*, 525.

See MORTGAGES, 6, 7, 8, 9.

ESTOPPEL.

1. A mere promise or statement of intention by an owner does not estop her from afterward suing for possession of land. *Kapiolani Estate v. Thurston*, 312, 346.
2. Territory is not estopped to claim damages for loss of dredger by negligence of defendants in taking it to Pearl Harbor, by consent of the superintendent of public works upon condition, if conditions are not performed, or by mere knowledge and silence of the assistant superintendent of public works. *Territory v. Cotton Bros.*, 618.
3. Consent to do a thing is not consent to do it negligently. *Ibid.*

See RES JUDICATA.

EVIDENCE.

1. Discretion of trial court as to allowance of questions in cross-examination. *Meheula v. Pioneer Mill Co.*, 56.
2. Evidence must be clear to justify cancellation of mortgage on ground of mistake. *Scott v. Hackfeld & Co.*, 66.
3. Tax assessment books may not be referred to in supreme court on an appeal from a district magistrate to amplify his record. *Holt v. Savidge*, 84.
4. A sheriff may not testify as to facts occurring in the sessions of the grand jury. *Arruda v. Morton*, 126.
5. Details of conversation admissible in proof of complaint by prosecutrix in action for assault with intent to commit rape. *Territory v. Schilling*, 249.
6. Where marriage is proved by reputation, evidence of reputation of illicit living is admissible. *Kapiolani Estate v. Thurston*, 312, 346.
7. Action of church in dismissing a woman from membership for illicit cohabitation is not admissible to prove reputation of such illicit living. *Ibid.*
8. New trial not granted for harmless error in admitting evidence. *Ibid.*
9. Refusal of a witness sworn to testify before a grand jury is a direct criminal contempt. *In re Anin*, 336.
10. Exceptions do not lie to review judgment of circuit court in such matter. *Ibid.*
11. A witness is not privileged to decline to answer an immaterial question. *In re Anin*, 338.
12. The statute which precludes prosecution of a witness for gambling, in consequence of testimony he gives, takes from him the privilege of declining to answer. *Ibid.*
13. An oath of secrecy cannot be required of a witness before a grand jury and it is not contempt of court for a witness to violate such an oath. *In re Anin*, 341.
14. Evidence held to show that beer was sold on saloon premises. *Territory v. Wong Feart*, 353.
15. Evidence of illegal selling of liquor on other days than that in the charge admissible. *Ibid.*
16. Evidence held not to show duress by husband of wife in matter of deed. *Kahula v. Kanewanui*, 466.
17. Land commission award and royal patent contained in volumes of awards and royal patents are prima facie evidence that land was awarded and patented though undated and unaccompanied by evidence that commissioners were authorized to make award and though the sheet has become loose and there is an unexplained change in number of royal patent. *Carter v. Kainahaole*, 533.

EVIDENCE.—Continued.

18. When in an ejectment suit plaintiff claims title by adverse possession, probate records, inventory filed by administratrix, petition for order to sell, and plea in answer to an ejectment suit are all admissible to show nature of claim of plaintiff's predecessor in title and as admissions by defendant the administration of plaintiff's predecessor. *Ibid.*
19. Affidavit of mortgagee is evidence of facts therein stated as to foreclosure, and §2161 R. L. providing therefor is constitutional. *Ibid.*
20. In a prosecution for furnishing intoxicating liquor to minors the burden of proof is upon the defendant to show his ignorance that the boy was a minor or that he had no reason to suppose it. *Territory v. Hall*, 536.
21. Evidence as to whether injuries by defendant or disease caused loss of employment. *Kingham v. H. R. T. & L. Co.*, 547.
22. A baptismal record may be received in evidence upon proof of handwriting of the clergyman who made it, he being in Australia. *Godfrey v. Rowland*, 577.
23. Mother's evidence cannot be admitted to bastardize the issue born after marriage. *Ibid.*
24. Testimony of members of legislature inadmissible for purpose of determining construction of statute. *Trent v. Fisher*, 612.
25. Evidence held to support verdict for \$25,000 for loss of dredger through negligence of defendants in taking it to the bar at entrance to Pearl Harbor, where it sank. *Territory v. Cotton Bros.*, 618.
26. A nautical expert may properly be asked whether it would be "safe or prudent" to moor a dredger as described. *Ibid.*

EXCEPTIONS.

See BILL OF EXCEPTIONS.

An exception is taken for the purpose of a review by an appellate court and is not necessary for a review by the trial court. *Roe v. McGrew*, 596.

EXECUTORS AND ADMINISTRATORS.

1. Proceeds of insurance policies payable to legal heirs of intestate collected by administrator are not assets of the estate. *Estate of Scrimgeour*, 122.
2. Although an executor is not in law entitled to possession of land, a defendant who allows the substitution of an executor as plaintiff in an ejectment case without objection must be regarded as having waived objections to the capacity of the plaintiff. *Magoon v. Pioneer Mill Co.*, 159.

EXECUTORS AND ADMINISTRATORS.—Continued.

3. When an estate is insolvent the administrator may recover from the decedent's mortgagee in an action of assumpsit, a surplus remaining in his hands after foreclosure and payment of the mortgage debt, without making the heirs parties to the action. *Whitney v. Ross*, 453.
4. Administrators not properly made parties in suit in equity to set aside a deed for fraud, undue influence and duress. *Kahala v. Kanewanui*, 466.
5. Administrator not authorized to pay claim not presented according to law. *Estate Kaiu*, 514.
6. Administrators' commissions may be reduced for neglect of duties. *Ibid.*
7. Administrator should wind up estate in about eight months. *Ibid.*

FIXTURES.

Water tanks connected by spouts by roof gutters nailed to them held to be fixtures and not removable by a tenant who has covenanted to yield up premises with all erections, buildings and improvements placed upon the same. *Maguire v. Gomes*, 493.

GAMBLING.

1. Board of supervisors of a county has power to make ordinance relating to gambling but not perhaps to impose imprisonment. *County of Oahu v. Whitney*, 181.
2. Statute which precludes prosecution of a witness in consequence of testimony he may give takes from him the privilege of declining to answer on that ground. *In re Anin*, 338.
3. A defendant charged with gambling has a right to a jury trial in the first instance but it is waived by not demanding a jury when brought before a magistrate for trial. *Ex parte Higashi*, 428.

GARNISHMENT.

A seaman's wages cannot be garnisheed either before or after judgment. *Holt v. Tullett*, 416.

GOVERNOR.

The governor of the Territory is not authorized to make a covenant for the Territory that it will remove buildings and fences in good condition, from land conveyed to the Territory by their owner. *Lucweiko v. Territory of Hawaii*, 30.

GUARDIAN AND WARD.

Should file annual accounts.—Expenditures.—Commissions. *Guardianship of Kaiu*, 517.

HABEAS CORPUS.

1. Infamous punishment for five days prior to his bringing a habeas corpus petition of one sentenced for a misdemeanor by forcing him to labor in public with felons does not entitle a prisoner to his discharge. *Ex rel Wong Lung*, 168.
2. It is only when a judgment is void that prisoner is set at large. The writ of habeas corpus is not used to correct errors. *In re Anin*, 338.
3. A prisoner may not be released after conviction for a misdemeanor on ground that he was wrongfully arrested without a warrant and that the sentence and mittimus illegally included hard labor. *In re Akamu*, 487.

HOLIDAY.

It is not lawful to hold court on a legal holiday. *Territory of Hawaii v. Ah On*, 19.

HIGHWAYS.

The fee in a highway can not be acquired by the government by a mere enactment of a law to that effect. *In re Haw. Trust Co., Ltd.*, 523.

HUSBAND AND WIFE.

See DIVORCE.

1. Children of an adulterous intercourse not legitimatized by parents' subsequent marriage. *Kealoha v. Castle*, 45.
2. Where marriage is proved by reputation, evidence of reputation of non-marriage is admissible. *Kapiolani Estate v. Thurston*, 312, 346.
3. Duress by husband against wife. *Kahula v. Kanewanui*, 466.
4. Evidence held to show contract of rental by a husband. *Wilcox v. Hartman*, 481.

INJUNCTION.

Where right to injunction is based upon a judgment which is later set aside by supreme court the decree for injunction will be reversed on appeal. *Roy v. Scott*, 600.

INSTRUCTIONS.

1. The effect upon a jury of wrong instructions is not removed by giving right instructions upon the same subject, the jury not being instructed to disregard the wrong ones. *Territory v. Richardson*, 231.
2. Instructions as to intent approved in charge of assault with intent to commit rape. *Territory v. Schilling*, 249.

INSURANCE.

Proceeds of insurance policies payable to legal heirs of an intestate, although collected by the administrator, are not assets of the estate. *Estate of Scrimgeour*, 122.

INTOXICATING LIQUORS.

1. The title of "an act to authorize licenses for the retail of wines," etc., is sufficient to authorize a penalty for violations of conditions expressed in such licenses. *Territory v. Wong Feart*, 353.
2. A provision in a liquor law that district magistrates shall have jurisdiction to hear and determine all prosecutions under it does not give district magistrates exclusive jurisdiction. *Ibid.*
3. Evidence held to show that beer was sold on saloon premises on Sunday. *Ibid.*
4. Evidence of illegal selling on other days than that in the charge admissible. *Ibid.*
5. It is no defense to a charge of furnishing beer to minors that the beer was not directly furnished by the licensee or his employees but that his employees dealt out the beer to others who set it before the minors. *Territory of Hawaii v. Hall*, 536.
6. Where in a prosecution for furnishing intoxicating liquor to a minor the age of minor is proved, the burden of proof is upon the licensee to show his ignorance that the boy was a minor or that he had no reason to suppose it. *Ibid.*

JUDGMENTS.

1. A landlord is not estopped by a judgment in ejectment against his tenant. *Castle v. Kapiolani Estate, Ltd.*, 61.
2. A deficiency judgment in a foreclosure suit is authorized against mortgagors without foreclosing interest of the Territory of Hawaii, a subsequent purchaser. *Polyblank v. Kawananakoa*, 82.
3. The supreme court has no authority upon overruling exceptions to make a final judgment affirming the judgment of the circuit court. *Meheula v. Pioneer Mill Co.*, 91.
4. A judgment against plaintiff in an ejectment suit does not estop plaintiff from suing a person not in privity with first defendant for a different piece of land although the sole issue of fact is identical in both cases. *Tibbetts v. Damon*, 203.
5. Exceptions do not lie to review a judgment of a circuit court in a case of direct criminal contempt. *In re Anin*, 336.
6. An adjudication of criminal contempt can be made in absence of defendant. *In re Anin*, 338.
7. Bonds for new trial should be filed within ten days of verdict—not of date of entering of judgment. *Territory v. Cotton Bros.*, 374.

JUDGMENTS.—Continued.

8. When is judgment rendered when entered nunc pro tunc? Query. *Notley v. Brown*, 455.
9. A person may not be sentenced for contempt of court until found guilty of the crime and the mittimus must show that he has been so convicted. *Ex parte Thurston*, 639.

JUDICIAL SALES.

1. Orders confirming or setting aside judicial sales are appealable. *Smith v. Pac. Heights Ry. Co.*, 96.
2. A sale may be set aside for gross inadequacy of price such as shocks the conscience. *Ibid.*

JURIES AND JURY TRIALS.

1. Act 74 of Laws of 1905 did not invalidate jury lists prepared in accordance with Ch. 119 of Revised Laws. *Murray v. Lewis*, 23.
2. The law limiting civil jury trials, unless by consent, to first sixty days of each term in the first circuit is not in conflict with the provision of the organic act that each law shall embrace but one subject, which shall be expressed in its title. *Ahmi v. Buckle*, 200.
3. Where conflicting instructions are given upon the same subject, which is vital to the case, a new trial should be granted. *Territory v. Richardson*, 231.
4. Comments of court upon evidence reflecting upon course of defendant's attorney and restricting cross-examination upon non-essential matters held proper. *Territory v. Schilling*, 249.
5. It is a direct criminal contempt for a witness sworn to testify before a grand jury to refuse to answer a proper question, and exceptions do not lie to review a judgment of a circuit court in such matter. *In re Anin*, 336.
6. An oath of secrecy cannot be required of a witness before a grand jury and it is not contempt of court to violate such an oath. *In re Anin*, 341.
7. A defendant charged with gambling has a right to a jury trial in the first instance but this is waived by not demanding a jury when brought before a district magistrate for trial. *Ex parte Higashi*, 429.

JURISDICTION.

See EQUITY.

1. A circuit judge has jurisdiction over a quo warranto proceeding instituted to oust a supervisor-elect of a county on the ground that his nomination papers were forged. *Kanealii v. Hardy*, 9.

JURISDICTION.—Continued.

2. Jurisdiction of equity in quieting title is by a bill of peace or by a bill to remove a cloud. *Charman v. Charmon*, 171.
3. Violation of a county ordinance against gambling held to be an offense within jurisdiction of a district magistrate. *County of Oahu v. Whitney*, 174.
4. A provision in a liquor law that district magistrates shall have jurisdiction to hear and determine all prosecutions under it does not give such magistrates exclusive jurisdiction. *Territory v. Wong Feart*, 353.
5. An order granting a new trial is reviewable by writ of error when there is no jurisdiction to make the order. *Territory v. Cotton Bros.*, 374, 445.
6. The bond on a motion for a new trial must be filed within ten days after verdict, though judgment has not been rendered or the court will have no jurisdiction to entertain the motion. *Ibid.*
7. District courts have jurisdiction to try actions of trespass *quare clausam fregit* unless the title to real estate is in question. *Paris v. Scott*, 427.
8. On appeal from a district court the circuit court may try a case involving title to real estate where that fact did not appear in the district court. *Ibid.*
9. In a divorce suit against a defendant outside the Territory the court does not acquire jurisdiction by delivery to defendant of a copy of a summons in usual form, but defendant should be notified when to appear. *Zeave v. Zeave*, 463.
10. Circuit court has no jurisdiction to try on appeal from the district magistrate a case in which title to land is involved, and a writ of error will lie to set aside any verdict rendered. *Roy v. Scott*, 598.

LAND PATENTS.

The Superintendent of Public Works and not the Commissioner of Public Lands is the one to cause issuance of land patents for remnants of land in Honolulu not contained in any grant, not needed for any public purpose, and not within any contemplated public use. *Pratt v. Holloway*, 539.

LANDLORD AND TENANT.

1. A lease is not void between the parties for want of written authority to an agent to make it. *Takahashi v. Kualu*, 87.
2. Evidence held to show authority to agent to make lease. *Ibid.*
3. A lease is not a "transfer of real estate" within meaning of §2381 Revised Laws. *Ibid.*

LANDLORD AND TENANT.—Continued.

4. A covenant by lessee to pay taxes is not forfeited unless some taxes have been legally assessed. *Long v. Holt*, 198.
5. A landlord is not estopped by a judgment against a tenant in an ejectment suit of which he had knowledge. *Castle v. Kapiolani Estate, Ltd.*, 61; *Kapiolani Estate, Ltd., v. Thurston*, 312.
6. Tenant held not entitled to remove water tanks. *Maguire v. Gomes*, 493.

LICENSESES.

1. Payment of a license fee by a foreign corporation is made under duress when it is made under protest upon demand of the appropriate public officer under a statute which denies a delinquent corporation the benefit of the laws of the Territory. *Seattle Brewing & Malting Co. v. Treasurer*, 364.
 2. The treasurer may retain money paid for a license under protest, to await the result of a suit to recover it. *Ibid.*
 3. An action may be maintained against the treasurer of the Territory in his private capacity to recover money illegally exacted by him as a license fee, under color of his office, and paid under duress and protest. *Ibid.*
 4. Statute requiring annual fee from physicians and surgeons void. *Territory of Hawaii v. McDonald*, 389.
- See INTOXICATING LIQUOR.

MALICIOUS PROSECUTION.

Arruda v. Morton, 126.

MANDAMUS.

1. A writ of mandamus may issue to compel a circuit judge to pass upon the bond of a county supervisor where it is charged that the supervisor's nomination papers were forged but the facts are disputed and not yet adjudicated. *Kanealii v. Hardy*, 1.
2. Mandamus will be denied when useless, as to compel an assessor to assess income taxes of a corporation which has no assessable income. *County of Kauai v. Holt*, 146.
3. Mandamus to compel an assessor with whom tax returns have been wrongly filed to send them to the proper tax assessor will be denied. *Ibid.*
4. Statutory attorney's fees may be taxed in mandamus cases. *Rodrigues v. Teixeira*, 489.

MINORS.

See CHILDREN; GUARDIAN AND WARD; ADVERSE POSSESSION.

MORTGAGES.

1. An accounting is not a condition precedent to a foreclosure. *Maile v. Carter*, 49.
2. Foreclosure not barred though suit on note may be. *Ibid*.
3. Held not necessary on foreclosure to subdivide premises. *Ibid*.
4. Sale may be made without suit in pursuance of provisions of mortgage where there is no valid statute sustaining it. *Ibid*; *Carter v. Kaikainahaole*, 528.
5. Mortgage may not be cancelled on ground of mistake unless proof is clear. *Scott v. Hackfeld & Co.*, 66.
6. A mortgagor may not complain because his interest in mortgaged premises is foreclosed without joining subsequent purchaser of a portion. *Polyblank v. Kawananakoa*, 82.
7. A deficiency judgment may be entered against mortgagors if all mortgaged property be sold except a portion now held by the Territory. *Ibid*.
8. A sale in a foreclosure suit may be set aside for gross inadequacy of price such as shocks the conscience. *Smith v. Pacific Heights Ry. Co.*, 96.
9. Where by mistake the name of a mortgagee is given in a mortgage as Hawaiian Evangelical Association (which is a voluntary association) instead of Board of the Hawaiian Evangelical Association, a corporation, the actual mortgagee may bring suit to foreclose without first bringing a suit for reformation of the mortgage and need not make the members of the Hawaiian Evangelical Association parties. *Chamberlain v. Bush*, 119.
10. Upon foreclosure of a mortgage any surplus should be paid to the administrator and not to the heir of the mortgagor if the mortgagor's estate is insolvent. In such case the administrator may recover from the mortgagor in an action of assumpsit without making the heirs parties. *Whitney v. Ross*, 453.
11. §2161 R. L. is valid and affidavit of mortgagee's attorney is evidence of matters therein stated showing that mortgagee had in all respects complied with the requisites of the power of sale in the mortgage. *Carter v. Kaikainahaole*, 528.
12. Mortgagor's assignee may sue mortgagee's attorneys for surplus moneys consisting of excess fee retained by attorneys out of proceeds of sale in their hands after paying debt and foreclosure expenses, when such surplus consists of excess fee. *Brown v. Judd*, 606.

NATURALIZATION.

Circuit courts of the Territory have power to naturalize. *Territory v. Morita Kaizo*, 295.

NEGOTIABLE INSTRUMENTS.

1. A corporation has no authority to endorse a note in order to enable maker to get credit with seller of goods. *Thompson v. Whitney & Marsh*, 109.
2. The fact that the maker of an endorsed note causes it to be discounted for his own benefit is notice to the discounteer that the indorsement is for the accommodation of the maker. *Ibid.*
3. Upon nonsuit in an action on a note on ground that it is not stamped, the evidence showing that note was given for goods sold and delivered, it is an abuse of discretion for a district magistrate to refuse to allow an amendment adding a count for goods sold and delivered. *Lau Bow v. Kiley*, 222.

NEW TRIAL.

1. Not granted for harmless error in admitting evidence. *Kapiolani Estate v. Thurston*, 312.
2. An order granting a new trial will be reviewed on writ of error if there was no jurisdiction to make the order. *Territory v. Cotton Bros.*, 374.
3. Bond on motion for new trial must be filed within ten days after verdict even though judgment be not entered. *Ibid.*
4. Filing of bond for new trial within ten days may be waived, either expressly or by implication, but is not waived by mere request of counsel for a postponement on ground of engagements otherwise. *Ibid.*
5. A motion for new trial may be decided at a subsequent term, but an order for a new trial may not be made sua sponte by a judge after that term. *Territory v. Cotton Bros.*, 445.

NOTICE.

1. The fact that the maker of an indorsed note causes it to be discounted for his own benefit is notice to the discounteer that the indorsement is for accommodation. *Thompson v. Whitney & Marsh*, 109.
2. Deed to Territory will not be rescinded in equity for breach of covenant when the Honolulu Rapid Transit and Land Company without notice of the breach of covenant has acquired rights in the land for street railway purposes. *Lucweiko v. Territory*, 304.
3. When a decedent's estate is insolvent, an administrator can without notice to the heirs recover in assumpsit a surplus remaining in a mortgagor's hands after foreclosure of a mortgage by decedent. *Whitney v. Ross*, 453.

PARTIES.

1. In a suit to foreclose a mortgage, a subsequent purchaser of a portion, is not a necessary party, though he is not affected unless joined. *Polyblank v. Kawanānakoā*, 82.

PARTIES.—Continued.

2. The Territory of Hawaii can not be joined as party defendant in a foreclosure suit. *Ibid*.
3. A person whose name is erroneously inserted in a mortgage as mortgagee need not be made a party to a foreclosure suit brought by the actual mortgagee. *Chamberlain v. Bush*, 119.
4. When mandamus is brought to compel an assessor to assess taxes of certain corporations, the assessor of another tax division who has already assessed said taxes is not a necessary party. *County of Kauai v. Holt*, 146.
5. Where a defendant has allowed the substitution of an executor as plaintiff in ejectment without objection he has waived objections to the capacity of the plaintiff. *Magoon v. Pioneer Mill Co.*, 159.
6. Administrators not proper parties to suit in equity to set aside a deed. *Kahula v. Kanewanui*, 466.
7. Not entitled to fees as witnesses. *Rodrigues v. Teixeira*, 489.

PHYSICIANS.

An act that no license to physicians shall be granted to physicians unless applicant shall pay an annual fee of \$10.00 is void on ground that it discriminates between holders of licenses under the act and holders of prior licenses. *Territory v. McDonald*, 389.

PLEADING AND PRACTICE.

1. Petition in action by contractor on government building contract held not to show conditions required by the contract to make the Territory liable. *Amer.-Haw. Eng. & Con. Co. v. Territory of Hawaii*, 28, 132.
2. In a suit upon a promise by one to pay the note of another, no copy of the note need be attached to the complaint. *Castle v. Smith*, 32.
3. Dismissing a bill on close of plaintiff's case before defendant presents his case is not correct practice in equity or probate. *Teixeira v. Amer. Dry Goods Assn.*, 41; *Estate Keaho*, 311.
4. Allegation that an affiant was mistaken and inaccurate in his affidavit is not equivalent to a denial of the truth of any specific statement in the affidavit. *Maile v. Carter*, 56.
5. Construction of complaint for damages from malicious arrest and search of plaintiff's premises. *Arruda v. Morton*, 126.
6. Violation of a county ordinance against gambling held to be a criminal offense and within the jurisdiction of a district magistrate. *County of Oahu v. Whitney*, 174.
7. Prosecutions under county criminal ordinances should be in name of Territory. *Ibid*.

PLEADING AND PRACTICE.—Continued.

8. The law limiting jury trials in the first circuit to the first sixty days of each term unless by consent is not in conflict with the provision that each law shall embrace but one subject which shall be expressed in its title. *Ahmi v. Buckle*, 200.
9. A motion to strike out portions of a petition at law as irrelevant is improper, and should be denied. *Lowrey v. Territory of Hawaii*, 225.
10. An adjudication of contempt can be made in absence of defendant. *In re Anin*, 338.
11. The Territory has no right to discontinue statutory proceedings to determine value of land taken for a public street after appeal by land owner to circuit court from appraisement of commissioners and after construction of the street. *In re Kukui St.*, 360.
12. Not necessary to aver that contract of corporation was authorized by resolution of the stockholders. *Haw. Carriage Co. v. Schuman Carriage Co.*, 495.
13. An answer in an action of ejectment denying each and every allegation in the declaration authorizes a ruling that defendants are holding possession against the plaintiff's right. *Carter v. Kaikainahaole*, 528.
14. An order of nonsuit to which no objection is made at the time may be set aside at same term of court. *Roe v. McGrew*, 596.

POLICE.

1. A police officer is not a clerk within the meaning of 110a of Act 39 Laws of 1905. *Ter. of Hawaii v. Knell*, 135.
2. A county sheriff has power to appoint police officers without approval of county supervisors, the high sheriff or attorney general. *Ibid.*

POWER OF ATTORNEY.

1. A lease is not a "transfer of real estate" within the meaning of §2381 Rev. Laws. *Takahashi v. Kualu*, 87.
2. Receipts from laborers to chairman of a road board for their wages construed to be a power of attorney to the chairman to collect their wages from the county for them. *McClanahan v. Trent*, 191.

QUIETING TITLE.

1. Held to be no cloud on title alleged in plaintiff's petition in equity. *Charman v. Charman*, 171.
2. Judgment should not be given for plaintiffs in equity when answer denies plaintiffs' title. *Ibid.*

QUO WARRANTO.

1. A circuit judge has jurisdiction over a quo warranto proceeding instituted to oust a supervisor elect of a county on the ground that his nomination papers were forged. *Kanealii v. Hardy*, 9.
2. Counties are corporations within the meaning of the quo warranto statute. *Ibid.*
3. Circuit judge has jurisdiction though prayer for relief be too broad. *Ibid.*

RAPE.

1. A person convicted of assault and battery may be afterward prosecuted for assault with intent to commit rape, the assault being the same. *Territory v. Schilling*, 249.
2. Evidence of complaint by prosecution and details of conversation between her and person to whom she complained are admissible in prosecution for rape. *Territory v. Schilling*, 249.
3. Instructions as to intent in prosecution for assault with intent to commit rape approved. *Ibid.*

RECEIPT.

Construed to be power of attorney. *McClanahan v. Trent*, 191.

REFORMATION OF INSTRUMENTS.

Where a wrong party's name is inserted in a mortgage as mortgagee, a suit for foreclosure may be brought by the actual mortgagee without first bringing a suit to reform the instrument. *Chamberlain v. Bush*, 119.

REHEARING.

A rehearing may be granted if it appears that the former decision was clearly wrong or if it be probable that that can be shown on a rehearing. *Kapiolani Estate, Ltd., v. Thurston*, 346.

RES JUDICATA.

1. A landlord is not estopped by a judgment against a tenant in an ejectment suit of which he had knowledge and an opportunity to defend if he had chosen to do so. *Castle v. Kapiolani Estate, Ltd.*, 61; *Kapiolani Estate v. Thurston*, 312, 346.
2. A judgment against plaintiff in an ejectment suit does not estop her from bringing suit for different land against another defendant not in privity with the first defendant, although the sole issue of fact in the two cases is identical. *Tibbetts v. Damon*, 203.

REVISED LAWS.

The Revised Laws were constitutionally enacted as a whole. *In re Tom Pong*, 566.

SHERIFF.

1. A county sheriff has power to appoint police officers without approval of supervisors, the high sheriff or the attorney general. *Ter. of Hawaii v. Knell*, 135.
2. Board of county supervisors has no power to appoint a sheriff's clerk. *Lyman v. Maguire*, 142.

STATUTES.

1. An act expressed to take effect from its passage amending the former law relating to selection of jurors, but the provisions of which are not immediately applicable held not to repeal provisions of old law until new law applicable. *Murray v. Lewis*, 23.
2. The provision of the organic act that each law shall embrace but one subject which shall be expressed in its title is not violated by including a provision limiting jury trials in the first circuit to the first sixty days of each term unless by consent, in act purporting in its title to amend §1646 of Revised Laws of Hawaii relating to terms of the circuit courts. *Ahmi v. Buckle*, 200.
3. Statute requiring annual fee from physicians of \$10 does not apply to licenses granted prior to the act, and contravenes constitutional guaranty of equal protection of the laws and is void. *Territory v. McDonald*, 389.
4. Sec. 3179 R. L. authorizing imprisonment at hard labor is repealed as to the hard labor by Act 59 Laws of 1905 which provides that infamous punishment shall not be imposed on persons convicted of misdemeanors. *Ex parte Higashi*, 428.
5. Evidence of members of legislature inadmissible for purpose of determining construction of statute. *Trent v. Fisher*, 612
See CONSTITUTIONAL LAW.

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| 31 " " 142, § 18 | Kanealii v. Hardy, 13; Willis v. Kanealii, 248. |
| " " " 148, " 45 | Ahmi v. Buckle, 201; In re Tom Pong, 567. |
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- “ “ “ 157, “ 83 In re Anin, 342; Ex parte Higashi, 432.
- “ “ “ 158, “ 86 Ex parte Higashi, 430.
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- Supreme Court Rule 5 Meheula v. Pioneer Mill Co., Ltd., 91
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- Const. of 1894, Art. 97 Lowrey v. Territory, 293

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- “ “ “ 13 Territory of Hawaii v. McDonald, 391; Ex parte Higashi, 437; Pratt v. Holloway, 544.
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- “ “ “ § 1068 Territory of Hawaii v. McDonald, 389.
- “ “ “ Ch. 98 County of Kauai v. Holt, 150.

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- “ “ “ 1226-7 County of Kauai v. Holt, 152.
- “ “ Ch. 99 County of Kauai v. Holt, 148.
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- “ “ “ 1644, 1646 Territory of Hawaii v. Ah On, 20.
- “ “ “ 1647 Territory of Hawaii v. Wong Feart, 356.
- “ “ “ 1648-9 Ahin v. Opele, 526.
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- “ “ “ 1851 Estate of Kaiu, 516.
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- “ “ “ 1861 Meheula v. Pioneer Mill Co., 94.
- “ “ “ 1864 Campbell v. Lucas, 522; Territory of Hawaii v. Cotton Bros., 609.
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- “ “ “ 1936 Carter v. Kaikainahaole, 533.
- “ “ “ 1996 Castle v. Smith, 37; Takahashi v. Kualu, 89.
- “ “ Ch. 129 Polyblank v. Kawanakoa, 83.
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“ “ “ 2626	Seattle Brewing & Malting Co. v. Treasurer, 273.
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“ “ “ 2806	Ex parte Higashi, 443.
“ “ “ 2864, 2865-9, 2873, 2876	Territory of Hawaii v. Schilling, 251.
“ “ “ 2918	Territory of Hawaii v. Schilling, 253.
“ “ “ 2965	Territory of Hawaii v. Richardson, 234.
“ “ “ 2966	Seattle Brewing & Malting Co. v. Treasurer, 369.
“ “ “ 3069	In re Anin, 338.
“ “ “ 3073	In re Anin, 337.
“ “ “ 3082	Territory of Hawaii v. Schilling, 253.
“ “ “ 3173	Ex parte Higashi, 431.
“ “ “ 3179	Ex parte Higashi, 429.
“ “ “ 3182	In re Anin, 340.

LAWS OF 1905.

Laws of 1905, Act 3	In re Tom Pong, 569.
“ “ “ 33	Ex rel Wong Lung, 169; In re Akamu, 468.
“ “ “ 34	Territory of Hawaii v. Ah On, 20.
“ “ “ 37	Territory of Hawaii v. Ah On, 20; Ahmi v. Buckle, 201.
“ “ “ 39, § 8	Kanealii v. Hardy, 17.
“ “ “ 39, “ 9	Kanealii v. Hardy, 17; County of Oahu v. Whitney, 180; Lyman v. Maguire, 144; Pacific Oil Transportation Co. v. Bicknell, 576.
“ “ “ 39, “ 11	County of Oahu v. Whitney, 185.
“ “ “ 39, “ 13, 20	Territory of Hawaii v. Knell, 137.

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- Laws of 1905, Act 39, § 21 Kanealii v. Hardy, 2; Territory of Hawaii v. Knell, 137.
- “ “ “ 39, “ 22-7 Territory of Hawaii v. Knell, 137.
- “ “ “ 39, “ 29 Willis v. Kanealii, 244.
- “ “ “ 39, “ 40-50, 59 Kanealii v. Hardy, 11.
- “ “ “ 39, “ 60 Territory of Hawaii v. Knell, 138.
- “ “ “ 39, “ 62 Territory of Hawaii v. Knell, 138; Lyman v. Maguire, 144; County of Oahu v. Whitney, 180; Territory of Hawaii v. Ah Choy, 335.
- “ “ “ 39, “ 67 Territory of Hawaii v. Knell, 136.
- “ “ “ 39, “ 75 Lyman v. Maguire, 143; McClanahan v. Trent, 193.
- “ “ “ 39, “ 84 Love v. Love, 194.
- “ “ “ 39, “ 90 County of Oahu v. Whitney, 182
- “ “ “ 39, “110a Territory of Hawaii v. Knell, 136; Lyman v. Maguire, 144.
- “ “ Act 44 Rodrigues v. Teixeira, 491.
- “ “ “ 48 Territory of Hawaii v. McDonald, 389.
- “ “ “ 54 County of Kauai v. Holt 148.
- “ “ “ 58 Wong Lung v. High Sheriff 169; Ex parte Higashi, 434.
- “ “ “ 59 Ex rel Wong Lung, 169; Ex parte Higashi, 429, 434.
- “ “ “ 67 Territory of Hawaii v. Wong Feart, 354; Territory of Hawaii v. Hall, 536; In re Mills, 564
- “ “ “ 74 Murray v. Lewis, 24.
- “ “ “ 92 Notley v. Brown, 394.
- “ “ “ 93 County of Kauai v. Holt, 148; Trent v. Fisher, 613.
- “ “ “ 98 Seattle Brewing & Malting Co. v. Treasurer, 372.

STATUTE OF FRAUDS.

A promise by one to pay the debt of another is not within the statute of frauds when it is made mainly for the business purposes of the promisor and the consideration inures to his benefit. *Castle v. Smith*, 32.

STATUTE OF LIMITATIONS.

1. An action may be made upon a promise by one to pay notes of another, though an action on the notes be barred when the promise is made. *Castle v. Smith*, 32.
2. Adverse possession against a minor and her heir. *Magoon v. Pioneer Mill Co.*, 159.

STREET RAILWAYS.

1. A passenger may rely on a representation of a conductor that a transfer is good at a particular point from one line to a parallel line running in the same direction two short blocks distant. the transfer containing nothing to indicate it was not good as represented. *Jeffs v. H. R. T. & L. Co.*, 241.
2. Damages for ejection from car. *Kingham v. H. R. T. & L. Co.*, 547.

SUMMONS AND SERVICE.

1. In service upon a defendant in a divorce case by personal notice outside the Territory it is not sufficient to give him a copy of a summons in the usual form but he must be notified when to appear. *Zeave v. Zeave*, 463.
2. Motion to quash summons on ground that it gave twenty days to answer when only ten was allowed by law, properly denied. *Kahula v. Kanewanui*, 466.

SUPERINTENDENT OF PUBLIC WORKS.

1. Has right to recommend issuance of patents to town lots, to lease same. *Pratt v. Holloway*, 539.
 2. Remnants of land in Honolulu not contained in any grant, not needed for any public purpose, and not within any contemplated public use, are "town lots" within the meaning of §262 R. L. *Ibid.*
- See CONTRACTS, 2.

TAXATION.

1. An assessment of taxes to an "estate" is not authorized by statute. *Holt v. Savidge*, 84; *Long v. Holt*, 198.
2. The income tax of a corporation is assessable in the taxation division in which it has its principal office if a Hawaiian corporation, otherwise in the division in which its property is situated. *County of Hawaii v. Holt*, 146.
3. The assessor of one division has no legal duty to send tax returns filed with him to the assessor of the division where they should have been filed. *Ibid.*
4. When mandamus is brought to compel an assessor to assess taxes of certain corporations, the assessor of another tax division who has already assessed said taxes as assessable in his division is not a necessary party. *Ibid.*
5. If a taxpayer is properly assessed he cannot complain because others are not. *Oahu R. & L. Co. v. Assessor*, 163.
6. It is not necessary that the method by which the full cash value of a piece of property is arrived at should appear on the assessment book. *Ibid.*

TAXATION.—Continued.

7. Assessment of lessors' interest in sublease. *Ibid.*
8. Assessment of combined property used in raising sugar cane as enterprise for profit—under special conditions. *In re Taxes Gay & Robinson*, 227.
9. Assessment of property forming the basis of an enterprise for profit should not be affected by the liability of the owners under a personal contract to pay a life annuity as part of the purchase price of part of the property. *In re Taxes Gay & Robinson*, 237.
10. Burden is on appellant to show decision of tax appeal court erroneous. *In re taxes Wilder*, 425.
11. Counties are entitled to 50% of taxes delinquent before but collected after county government was established. *Trent v. Fisher*, 612.

TENANTS IN COMMON.

See EJECTMENT 6.

TREASURER.

1. An action may be maintained against the treasurer of the Territory to recover money illegally exacted by him under color of his office and paid under duress and protest. *Seattle Brewing & Malting Co. v. Treasurer*, 364.
 2. The treasurer may retain money paid him under protest to await result of an action to recover it. *Ibid.*
- See COUNTIES 9, 10.

TRUSTS.

1. Trust deed not set aside on ground of duress, mistake and undue influence, and allegations insufficient. *Cummins v. Carter*, 71.
2. A trust deed is not revocable because voluntary, for benefit of grantor for life, and without consideration, and without even the knowledge of the cestuis que trustent and made merely for business convenience with the full belief that it was revocable. *Love v. Love*, 206.
3. Trust deed held not to be a will, and not to be indefinite, ambiguous and uncertain. *Ibid*
4. Counsel fee of trustee held properly paid out of trust income. *Estate of Love*, 484.

WAIVER.

1. Filing of bond for new trial within ten days may be waived either expressly or by implication but is not waived by mere request for a postponement of hearing on ground that counsel is otherwise engaged. *Territory v. Cotton Bros.*, 374.

WAIVER.—Continued.

2. Right of trial by jury in the first instance for a misdemeanor is waived by failure to demand a jury when brought before a district magistrate for trial. *Ex parte Higashi*, 428.

WILLS.

1. Instrument held to be an irrevocable trust deed and not a will. *Love v. Love*, 206.
2. Decree dismissing petition to revoke probate of a will for forgery affirmed. *Estate Keaho*, 308.

WITNESSES.

Not entitled to witness fees when parties in the case. *Rodrigues v. Teixeira*, 489.

WORDS AND PHRASES.

See DEFINITIONS.

WRITS OF ERROR.

1. An order granting a new trial is not reviewable on error unless there was no jurisdiction to make the order. *Territory v. Cotton Bros.*, 394.
2. A writ of error bringing up questions already decided by this court on exceptions in the same case will on motion be dismissed. *Notley v. Brown*, 455.
3. A writ of error lies to revise an erroneous ruling of the circuit court as to its jurisdiction in a case appealed from a district magistrate which involves title to land. *Roy v. Scott*, 598.